No. 17-1625

IN THE
Supreme Court of the United States

RIMINI STREET, INC., AND SETH RAVIN,

Petitioners,

v.

ORACLE USA, INC., ORACLE AMERICA, INC., AND ORACLE INTERNATIONAL CORPORATION,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED MAY 31, 2018
CERTIORARI GRANTED SEPTEMBER 27, 2018

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Ceneral Docket
United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 16-16832 **Nature of Suit:** 3820 Copyright Oracle USA. Inc., et al v. Rimini Street, Inc., et al **Appeal From:** U.S. District Court for Nevada, Las Vegas **Fee Status:** Paid	**Docketed:** 10/12/2016 **Termed:** 01/08/2018
Case Type Information: 1) Civil 2) Private 3) null	
Originating Court Information: **District:** 0978-2: 2:10-cv-00106-LRH-VCF **Trial Judge:** Larry R. Hicks, District Judge **Date Filed:** 01/25/2010 **Date Order/Judgment:** 10/11/2016 **Date Order/Judgment EOD:** 10/11/2016 **Date NOA Filed:** 10/11/2016 **Date Rec'd COA:** 10/11/2016	
Prior Cases: None **Current Cases:** Consolidated **Lead** 16-16832 **Member** 16-16905	

Start 12/06/2016 **End**

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ORACLE USA, INC., a Colorado corporation; ORACLE AMERICA, INC., a Delaware corporation; ORACLE INTERNATIONAL CORPORATION, a California corporation,

Plaintiffs-Appellees,

v.

RIMINI STREET, INC., a Nevada corporation;

SETH RAVIN, an individual, Defendants-Appellants.

10/12/2016	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Mediation Questionnaire due on 10/19/2016. Transcript ordered by 11/10/2016. Transcript due 12/12/2016. Appellants Seth Ravin and Rimini Street, Inc. opening brief due 01/19/2017. Appellees Oracle America, Inc., Oracle International Corporation and Oracle USA, Inc. answering brief due 02/21/2017. Appellant's optional reply brief is due 14 days after service of the answering brief. [10156601] (RT) [Entered: 10/12/2016 11:44 AM]
10/19/2016	2	Filed (ECF) Appellants Rimini Street, Inc. and Seth Ravin Mediation Questionnaire. Date of service: 10/19/2016. [10166641] [16-16832] (Perry, Mark) [Entered: 10/19/2016 05:42 PM]

11/10/2016	3	Filed (ECF) Appellants Seth Ravin and Rimini Street, Inc. EMERGENCY Motion to stay lower court action. Date of service: 11/10/2016. [10193932] [16-16832] (Perry, Mark) [Entered: 11/10/2016 03:49 PM]
11/10/2016	4	Filed (ECF) Appellants Seth Ravin and Rimini Street, Inc. Motion to consolidate cases 16-16832 and 16-16905, Motion to expedite case. Date of service: 11/10/2016. [10193944] [16-16832] (Perry, Mark) [Entered: 11/10/2016 03:54 PM]
11/15/2016	5	Filed order (WILLIAM C. CANBY) Appellants' request for an immediate administrative stay pending consideration of their emergency motion is denied. The responses to the emergency motion, motion to consolidate, and motion to expedite are due November 22, 2016. The optional replies in support of those motions are due November 25, 2016. All pending motions will be addressed by separate order. [10197999] [16-16832, 16-16905] (WL) [Entered: 11/15/2016 03:24 PM]

11/22/2016	6	Filed (ECF) notice of appearance of David B. Salmons for Appellees Oracle America, Inc., Oracle International Corporation and Oracle USA, Inc.. Date of service: 11/22/2016. [10206268] [16-16832] (Salmons, David) [Entered: 11/22/2016 09:42 AM]
11/22/2016	7	Filed (ECF) notice of appearance of Thomas S. Hixson for Appellees Oracle America, Inc., Oracle International Corporation and Oracle USA, Inc.. Date of service: 11/22/2016. [10206283] [16-16832] (Hixson, Thomas) [Entered: 11/22/2016 09:45 AM]
11/22/2016	8	Added attorney David Bruce Salmons for Oracle USA, Inc. Oracle America, Inc. Oracle International Corporation, in case 16-16832. [10206383] (Walker, Synitha) [Entered: 11/22/2016 10:15 AM]
11/22/2016	9	Added attorney Thomas S. Hixson for Oracle USA, Inc. Oracle America, Inc. Oracle International Corporation, in case 16-16832. [10206389] (Walker, Synitha) [Entered: 11/22/2016 10:16 AM]

11/22/2016	10	Filed (ECF) notice of appearance of Karen Leah Dunn for Appellees Oracle America, Inc., Oracle International Corporation and Oracle USA, Inc.. Date of service: 11/22/2016. [10206463] [16-16832] (Dunn, Karen) [Entered: 11/22/2016 10:30 AM]
11/22/2016	11	Filed (ECF) notice of appearance of Richard J. Pocker for Appellees Oracle America, Inc., Oracle International Corporation and Oracle USA, Inc.. Date of service: 11/22/2016. [10206465] [16-16832] (Pocker, Richard) [Entered: 11/22/2016 10:30 AM]
11/22/2016	12	Added attorney Karen L. Dunn for Oracle USA, Inc. Oracle America, Inc. Oracle International Corporation, in case 16-16832. [10206507] (Walker, Synitha) [Entered: 11/22/2016 10:40 AM]
11/22/2016	13	Added attorney Richard J. Pocker for Oracle USA, Inc. Oracle America, Inc. Oracle International Corporation, in case 16-16832. [10206509] (Walker, Synitha) [Entered: 11/22/2016 10:42 AM]

11/22/2016	14	Filed (ECF) notice of appearance of Paul D. Clement for Appellees Oracle America, Inc., Oracle International Corporation and Oracle USA, Inc.. Date of service: 11/22/2016. [10206529] [16-16832] (Clement, Paul) [Entered: 11/22/2016 10:50 AM]
11/22/2016	15	Filed (ECF) notice of appearance of William A. Isaacson for Appellees Oracle America, Inc., Oracle International Corporation and Oracle USA, Inc.. Date of service: 11/22/2016. [10206606] [16-16832] (Isaacson, William) [Entered: 11/22/2016 11:11 AM]
11/22/2016	16	Added attorney Paul D. Clement for Oracle USA, Inc. Oracle America, Inc. Oracle International Corporation, in case 16-16832. [10206828] (Walker, Synitha) [Entered: 11/22/2016 12:34 PM]
11/22/2016	17	Added attorney William A. Isaacson for Oracle USA, Inc. Oracle America, Inc. Oracle International Corporation, in case 16-16832. [10206881] (Walker, Synitha) [Entered: 11/22/2016 12:58 PM]

11/22/2016	18	Filed (ECF) notice of appearance of Steven Christopher Holtzman for Appellees Oracle America, Inc., Oracle International Corporation and Oracle USA, Inc.. Date of service: 11/22/2016. [10206999] [16-16832] (Holtzman, Steven) [Entered: 11/22/2016 01:38 PM]
11/22/2016	19	Added attorney Steven Christopher Holtzman for Oracle USA, Inc. Oracle America, Inc. Oracle International Corporation, in case 16-16832. [10207340] (Walker, Synitha) [Entered: 11/22/2016 02:46 PM]
11/22/2016	20	Filed (ECF) Appellees Oracle America, Inc., Oracle International Corporation and Oracle USA, Inc. response opposing motion ([4] Motion (ECF Filing), [4] Motion (ECF Filing) motion to consolidate cases, [4] Motion (ECF Filing) motion to expedite case). Date of service: 11/22/2016. [10207454] [16-16832] (Salmons, David) [Entered: 11/22/2016 03:12 PM]

11/22/2016	21	Filed (ECF) Appellees Oracle America, Inc., Oracle International Corporation and Oracle USA, Inc. response opposing motion ([3] Motion (ECF Filing), [3] Motion (ECF Filing) motion to stay lower court action). Date of service: 11/22/2016. [10207466] [16-16832] (Salmons, David) [Entered: 11/22/2016 03:16 PM]
11/23/2016	22	MEDIATION CONFERENCE SCHEDULED - DIAL-IN Assessment Conference, 12/09/2016, 1:30 p.m. PACIFIC Time. See order for instructions and details. [10209529] [16-16832, 16-16905] (MS) [Entered: 11/23/2016 02:33 PM]
11/25/2016	23	Filed (ECF) Appellants Seth Ravin and Rimini Street, Inc. reply to response (motion to consolidate cases, motion to expedite case). Date of service: 11/25/2016. [10210978] [16-16832] (Perry, Mark) [Entered: 11/25/2016 04:01 PM]
11/25/2016	24	Filed (ECF) Appellants Seth Ravin and Rimini Street, Inc. reply to response (motion to stay lower court action). Date of service: 11/25/2016. [10210982] [16-16832] (Perry, Mark) [Entered: 11/25/2016 04:07 PM]

11/30/2016	25	**MEDIATION CONFERENCE RESCHEDULED - DIAL-IN Assessment Conference, 12/13/2016, 10:00 a.m. Pacific Time. (originally scheduled on 12/09/2016). [10216083] [16-16832, 16-16905] (MS) [Entered: 11/30/2016 03:15 PM]**

12/06/2016	26	Filed order (SIDNEY R. THOMAS and EDWARD LEAVY) Appellants' emergency motion to stay the district court's October 11, 2016 permanent injunction pending appeal (Docket Entry No.[3]) is granted. See Hilton v. Braunskill, 481 U.S. 770, 776 (1987). Appellants' motion to consolidate and expedite appeal Nos. 16-16832 and 16-16905 (Docket Entry No.[4]) is granted in part. These appeals are consolidated. The consolidated opening brief is due January 19, 2017. The consolidated answering brief is due February 21, 2016. The optional consolidated reply brief is due within 14 days after service of the answering brief. The Clerk shall calendar these consolidated appeals as soon as practicable after briefing is complete. [10222811] [16-16832, 16-16905] (TSP) [Entered: 12/06/2016 04:10 PM]

12/13/2016	27	Filed Mediation order: These consolidated appeals are not selected for inclusion in the Mediation Program. All further inquiries regarding these appeals, including requests for extensions of time, should be directed to the Clerk's office. Counsel are requested to contact the Circuit Mediator should circumstances develop that warrant further settlement discussions. [10231489] [16-16832, 16-16905] (MS) [Entered: 12/13/2016 02:23 PM]
01/19/2017	28	STRICKEN PER ORDER [35]. ~~Submitted (ECF) Opening Brief for review. Submitted by Appellant Rimini Street, Inc. in 16-16832, 16-16905. Date of service: 01/19/2017.~~ [10272783] [16-16832, 16-16905] (Perry, Mark) [Entered: 01/19/2017 08:29 PM]
01/19/2017	29	STRICKEN PER ORDER [35]. ~~Submitted (ECF) Opening Brief for review. Submitted by Appellant Seth Ravin in 16-16832, 16-16905. Date of service: 01/19/2017.~~ [10272784] [16-16832, 16-16905] (Perry, Mark) [Entered: 01/19/2017 08:34 PM]

01/19/2017	30	STRICKEN PER ORDER [35]. ~~Filed (ECF) Appellant Rimini Street, Inc. in 16-16832, 16-16905 joinder to brief [29] submitted by Appellant Seth Ravin in 16-16832, 16-16905. Date of service: 01/19/2017.~~ [10272785] [16-16832, 16-16905] (Perry, Mark) [Entered: 01/19/2017 08:36 PM]
01/19/2017	31	Submitted (ECF) excerpts of record. Submitted by Appellants Seth Ravin and Rimini Street, Inc. in 16-16832, 16-16905. Date of service: 01/19/2017. [10272786] [16-16832, 16-16905] (Perry, Mark) [Entered: 01/19/2017 08:41 PM]
01/19/2017	32	Filed (ECF) UNDER SEAL Appellants Seth Ravin and Rimini Street, Inc. in 16-16832, 16-16905 notice of intent to unseal previously sealed material. Material: excerpts of record. Date of service: 01/19/2017. [10272787] [16-16832, 16-16905]--[COURT UPDATE: Attached corrected excerpts. 01/23/2017 by LA] (Perry, Mark) [Entered: 01/19/2017 08:44 PM]

01/23/2017	33	Filed (ECF) Appellants Rimini Street, Inc. and Seth Ravin in 16-16832, 16-16905 Motion to file substitute or corrected brief. Date of service: 01/23/2017. [10276256] [16-16832, 16-16905] (Perry, Mark) [Entered: 01/23/2017 04:25 PM]
01/23/2017	34	Submitted (ECF) Opening Brief for review. Submitted by Appellants Rimini Street, Inc. and Seth Ravin in 16-16832, 16-16905. Date of service: 01/23/2017. [10276268] [16-16832, 16-16905] (Perry, Mark) [Entered: 01/23/2017 04:27 PM]

01/24/2017	35	Filed clerk order (Deputy Clerk: TAH): The appellants' motion (Docket Entry No. [33]) for leave to file a substitute opening brief is granted. The Clerk shall strike the previously submitted opening briefs and the notice of joinder (Docket Entry Nos. [28], [29], and [30]). The appellants' notice (Docket Entry No. [32]) of intent to unseal a portion of the excerpts of record will be addressed by separate order. When the notice of intent to unseal is resolved, the Clerk shall file the substitute opening brief (Docket Entry No. [34]). The remainder of the briefing schedule is unchanged. [10277209] [16-16832, 16-16905] (WL) [Entered: 01/24/2017 11:06 AM]
01/26/2017	36	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by Electronic Frontier Foundation. Date of service: 01/26/2017. [10280985] [16-16832, 16-16905] (Williams, Jamie) [Entered: 01/26/2017 11:09 AM]

01/26/2017	37	Entered appearance of Amicus Curiae Electronic Frontier Foundation. [10282571] [16-16832, 16-16905] (KT) [Entered: 01/27/2017 09:35 AM]
01/27/2017	38	Filed clerk order: The amicus brief [36] submitted by Electronic Frontier Foundation is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: green. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF. [10282676] [16-16832, 16-16905] (KT) [Entered: 01/27/2017 10:09 AM]
01/30/2017	39	Received 7 paper copies of Amicus Brief [36] filed by Electronic Frontier Foundation. [10290237] [16-16832, 16-16905] (SD) [Entered: 01/30/2017 01:52 PM]

02/15/2017	40	Filed (ECF) notice of filing document ([32]) publicly pursuant to Interim Circuit Rule 27-13(f). Filed by Appellants Seth Ravin and Rimini Street, Inc. in 16-16832, 16-16905. Date of service: 01/19/2017. (Courtentered filing) [10321252] [16-16832, 16-16905] (WL) [Entered: 02/15/2017 03:13 PM]
02/15/2017	41	Filed clerk order (Deputy Clerk: SVG): On January 19, 2017, at Docket Entry No. [32], appellants filed a notice of intent to file previously sealed documents publicly pursuant to Interim Ninth Circuit Rule 27-13(f), and submitted Volume 8 of their excerpts of record provisionally under seal. No other party has filed a motion to file or maintain these documents under seal. Therefore, the Clerk is directed to unseal the notice and the excerpts, and to publicly file the substitute opening brief and all 8 volumes of the excerpts of record. The existing briefing schedule continues in effect. [10321257] [16-16832, 16-16905] (WL) [Entered: 02/15/2017 03:15 PM]

02/15/2017	42	Submitted (ECF) excerpts of record Vol 8. Submitted by Appellants Seth Ravin and Rimini Street, Inc. in 16-16832, 16-16905. Date of service: 01/19/2017. (Court-entered filing, excerpts of record originally submitted in [32].) [10321271] [16-16832, 16-16905] (WL) [Entered: 02/15/2017 03:18 PM]

02/15/2017	43	Filed clerk order: The substitute opening brief [34] submitted by Seth Ravin and Rimini Street, Inc. is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: blue. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF. The Court has reviewed the excerpts of record [31], [42] submitted by Seth Ravin and Rimini Street, Inc. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format, with a white cover. The paper copies must be in the format described in 9th Circuit Rule 30-1.6. [10321537] [16-16832, 16-16905] (KT) [Entered: 02/15/2017 04:32 PM]

02/17/2017	44	Filed 4 paper copies of excerpts of record [31], [42] in 8 volume(s) filed by Appellants Seth Ravin and Rimini Street, Inc. [10324665] [16-16832, 16-16905] (KT) [Entered: 02/17/2017 01:32 PM]
02/17/2017	45	Received 7 paper copies of substitute opening brief [34] filed by Seth Ravin and Rimini Street, Inc.. [10325240] [16-16832, 16-16905] (SD) [Entered: 02/17/2017 03:47 PM]
02/21/2017	46	Filed (ECF) notice of appearance of Erin E. Murphy for Appellees Oracle America, Inc., Oracle International Corporation and Oracle USA, Inc. in 16-16832, 16-16905. Date of service: 02/21/2017. [10327367] [16-16832, 16-16905] (Murphy, Erin) [Entered: 02/21/2017 03:11 PM]
02/21/2017	47	Filed (ECF) notice of appearance of Matthew D. Rowen for Appellees Oracle America, Inc., Oracle International Corporation and Oracle USA, Inc. in 16-16832, 16-16905. Date of service: 02/21/2017. [10327393] [16-16832, 16-16905] (Rowen, Matthew) [Entered: 02/21/2017 03:17 PM]

02/21/2017	48	Added attorney Erin E. Murphy for Oracle America, Inc. Oracle International Corporation, in case 16-16905 Erin E. Murphy for Oracle America, Inc., in case 16-16832. [10327680] [16-16832, 16-16905] (Walker, Synitha) [Entered: 02/21/2017 04:20 PM]
02/21/2017	49	Added attorney Matthew Rowen for Oracle America, Inc. Oracle International Corporation, in case 16-16905 Matthew Rowen for Oracle America, Inc., in case 16-16832. [10327686] [16-16832, 16-16905] (Walker, Synitha) [Entered: 02/21/2017 04:21 PM]
02/21/2017	50	Submitted (ECF) Answering Brief for review. Submitted by Appellees Oracle America, Inc., Oracle International Corporation and Oracle USA, Inc. in 16-16832, 16-16905. Date of service: 02/21/2017. [10327875] [16-16832, 16-16905] (Clement, Paul) [Entered: 02/21/2017 07:10 PM]

02/21/2017	51	Submitted (ECF) supplemental excerpts of record. Submitted by Appellees Oracle America, Inc., Oracle International Corporation and Oracle USA, Inc. in 16-16832, 16-16905. Date of service: 02/21/2017. [10327878] [16-16832, 16-16905] (Clement, Paul) [Entered: 02/21/2017 07:13 PM]
02/21/2017	52	Filed (ECF) UNDER SEAL Appellees Oracle America, Inc., Oracle International Corporation and Oracle USA, Inc. in 16-16832, 16-16905 notice of intent to unseal previously sealed material. Material: excerpts of record. Date of service: 02/21/2017. [10327879] [16-16832, 16-16905]--[COURT UPDATE: Attached corrected excerpts, updated docket text to reflect content of filing. 03/01/2017 by LA[(Clement, Paul) [Entered: 02/21/2017 07:16 PM]

03/03/2017	53	Filed (ECF) Appellees Oracle America, Inc., Oracle International Corporation and Oracle USA, Inc. in 16-16832, 16-16905 Correspondence: Oral argument availability. Date of service: 03/03/2017 [10342422] [16-16832, 16-16905] (Clement, Paul) [Entered: 03/03/2017 01:44 PM]
03/10/2017	54	Submitted (ECF) Reply Brief for review. Submitted by Appellants Seth Ravin and Rimini Street, Inc. in 16-16832, 16-16905. Date of service: 03/10/2017. [10352639] [16-16832, 16-16905] (Perry, Mark) [Entered: 03/10/2017 04:27 PM]
03/10/2017	55	Filed (ECF) UNDER SEAL Appellants Seth Ravin and Rimini Street, Inc. in 16-16832, 16-16905 notice of intent to unseal previously sealed material. Material: excerpts of record. Date of service: 03/10/2017. [10352645] [16-16832, 16-16905] (Perry, Mark) [Entered: 03/10/2017 04:31 PM]

03/16/2017	56	Filed (ECF) notice of filing document ([52]) publicly pursuant to Interim Circuit Rule 27-13(f). Filed by Appellees Oracle America, Inc., Oracle International Corporation and Oracle USA, Inc. in 16-16832, 16-16905. Date of service: 02/21/2017. (Court-entered filing) [10359478] [16-16832, 16-16905] (WL) [Entered: 03/16/2017 01:27 PM]

03/16/2017	57	Filed clerk order (Deputy Clerk: SVG): On February 21, 2017, appellees filed a notice of intent to file previously sealed documents publicly pursuant to Interim Ninth Circuit Rule 27-13(f), and submitted Volume 4 of the supplemental excerpts of record provisionally under seal. No other party has filed a motion to file or maintain these documents under seal. Therefore, the Clerk is directed to unseal the notice and the excerpts, and to publicly file all volumes of the supplemental excerpts and the answering brief. On March 10, 2017, appellants filed a notice of intent to file previously sealed documents publicly and submitted further excerpts of record provisionally under seal. If no other party files a motion to maintain those excerpts under seal by March 31, 2017, the Clerk shall unseal the notice and the excerpts and shall publicly file the reply brief and the further excerpts of record. Briefing is complete. [10359484] [16-16832, 16-16905] (WL) [Entered: 03/16/2017 01:29 PM]

03/16/2017	58	Submitted (ECF) supplemental excerpts of record Vol 4. Submitted by Appellees Oracle America, Inc., Oracle International Corporation and Oracle USA, Inc. in 16-16832, 16-16905. Date of service: 02/21/2017. (Court-entered filing, excerpts of record originally submitted in [52].) [10359489] [16-16832, 16-16905] (WL) [Entered: 03/16/2017 01:30 PM]

03/16/2017	59	Filed clerk order: The answering brief [50] submitted by appellees is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: red. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF. The Court has reviewed the supplemental excerpts of record [51], [58] submitted by appellees. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format, with a white cover. The paper copies must be in the format described in 9th Circuit Rule 30-1.6. [10359642] [16-16832, 16-16905] (KT) [Entered: 03/16/2017 02:05 PM]

03/17/2017	60	Filed (ECF) Appellants Rimini Street, Inc. and Seth Ravin in 16-16832, 16-16905 Correspondence: Scheduling of oral argument. Date of service: 03/17/2017 [10360495] [16-16832, 16-16905] (Perry, Mark) [Entered: 03/17/2017 08:14 AM]
03/20/2017	61	Received 7 paper copies of Answering Brief [50] filed by appellees. [10363579] [16-16832, 16-16905] (SD) [Entered: 03/20/2017 01:40 PM]
03/20/2017	62	Filed 4 paper copies of supplemental excerpts of record [51], [58] in 4 volume(s) filed by Appellees. [10365065] [16-16832, 16-16905] (KT) [Entered: 03/21/2017 10:46 AM]

03/28/2017	63	This case is being considered for the July 2017 San Francisco oral argument calendar. The exact date of your oral argument has not been determined at this time. The following is a link to the upcoming court sessions: http://cdn.ca9.uscourts.gov/datastore/uploads/calendar/sitdates_2017.pdf. Please review these upcoming dates immediately to determine if you have any conflicts with them. If you do have conflicts, please inform the Court within 3 days of this notice by sending a letter to the Court using CM/ECF (**Type of Document:** File Correspondence to Court; **Subject:** regarding availability for oral argument). The Court discourages motions to continue after this 3-day period. The clerk's office takes conflict dates into consideration in scheduling oral arguments but cannot guarantee that every request will be honored. Your case will be assigned to a calendar approximately 10 weeks before the scheduled oral argument date.

		Note that your case will be set for hearing in due course if it is not assigned to this calendar. In addition, if parties would like to discuss settlement before argument is scheduled, they should jointly request a referral to the mediation unit. Such a referral will postpone the calendaring of oral argument. All such requests must be made within 3 days of this notice by sending a letter to the Court using CM/ECF (Type of Document: File Correspondence to Court; Subject: request for mediation). Once the case is calendared, it is unlikely that the court will postpone argument for settlement discussions.[10374091] (AW) [Entered: 03/28/2017 10:51 AM]
03/28/2017	64	Filed (ECF) Appellants Rimini Street, Inc. and Seth Ravin in 16-16832, 16-16905 Correspondence: regarding availability for oral argument. Date of service: 03/28/2017 [10375123] [16-16832, 16-16905] (Perry, Mark) [Entered: 03/28/2017 03:34 PM]

03/31/2017	65	Filed (ECF) UNDER SEAL Appellees Oracle America, Inc., Oracle International Corporation and Oracle USA, Inc. in 16-16832, 16-16905 motion to maintain record under seal. Date of service: 03/31/2017. [10379687] [16-16832, 16-16905] (Clement, Paul) [Entered: 03/31/2017 03:29 PM]
04/03/2017	66	Filed (ECF) Appellants Rimini Street, Inc. and Seth Ravin in 16-16832, 16-16905 response to motion ([65] Motion (Seal) (ECF Filing)). Date of service: 04/03/2017. [10380422] [16-16832, 16-16905] (Perry, Mark) [Entered: 04/03/2017 09:48 AM]
04/04/2017	67	Filed (ECF) notice of filing document ([55]) publicly pursuant to Interim Circuit Rule 27-13(f). Filed by Appellants Seth Ravin and Rimini Street, Inc. in 16-16832, 16-16905. Date of service: 03/10/2017. (Courtentered filing) [10382920] [16-16832, 16-16905] (WL) [Entered: 04/04/2017 01:25 PM]

04/04/2017	68	Filed Appellees Oracle America, Inc., Oracle International Corporation and Oracle USA, Inc. in 16-16832, 16-16905 motion to maintain UNDER SEAL. Deficiencies: None. Served on 03/31/2017. (Court-entered filing of motion submitted under seal at [65]) [10382938] [16-16832, 16-16905] (WL) [Entered: 04/04/2017 01:29 PM]
04/04/2017	69	Filed order (Appellate Commissioner): Appellees' motion (Docket Entry No. [65]) to maintain a portion of appellant's Further Excerpts of Record under seal is granted. The Clerk shall publicly file appellants' notice of intent (DE [55]), appellees' motion to maintain under seal (DE [65]), and the reply brief (DE [54]), and shall file the unredacted further excerpts of record under seal. Within 7 days after the date of this order, appellants shall submit for public filing a redacted version of the further excerpts of record that omits pages FER 1 through 5. Briefing is complete. (Sealed Documents) [10382947] [16-16832, 16-16905] (WL) [Entered: 04/04/2017 01:31 PM]

04/04/2017	70	Submitted (ECF) UNDER SEAL Unredacted further excerpts of record. Submitted by Appellants Seth Ravin and Rimini Street, Inc. in 16-16832, 16-16905. Date of service: 03/10/2017. (Court-entered filing, excerpts of record originally submitted in [55].) [10382961] [16-16832, 16-16905] (WL) [Entered: 04/04/2017 01:36 PM]
04/04/2017	71	Submitted (ECF) further excerpts of record. Submitted by Appellants Rimini Street, Inc. and Seth Ravin in 16-16832, 16-16905. Date of service: 04/04/2017. [10383365] [16-16832, 16-16905] (Perry, Mark) [Entered: 04/04/2017 03:17 PM]

04/04/2017	72	Filed clerk order: The reply brief [54] submitted by Seth Ravin and Rimini Street, Inc. is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF. The Court has reviewed the further excerpts of record [70] submitted by Seth Ravin and Rimini Street, Inc.. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format, with a white cover. The paper copies must be in the format described in 9th Circuit Rule 30-1.6. [10383650] [16-16832, 16-16905] (KT) [Entered: 04/04/2017 04:27 PM]

04/04/2017	73	Filed clerk order: The Court has reviewed the redacted further excerpts of record [71] submitted by Seth Ravin and Rimini Street, Inc. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format, with a white cover. The paper copies must be in the format described in 9th Circuit Rule 30- 1.6. [10383660] [16-16832, 16-16905] (KT) [Entered: 04/04/2017 04:30 PM]
04/06/2017	74	Filed UNDER SEAL 4 paper copies of further excerpts of record [70] in 1 volume(s) filed by Appellants Seth Ravin and Rimini Street, Inc. (sent to panel) [10388193] [16-16832, 16-16905] (KT) [Entered: 04/07/2017 01:19 PM]
04/06/2017	75	Filed 4 paper copies of redacted further excerpts of record [71] in 1 volume(s) filed by Appellants Seth Ravin and Rimini Street, Inc. (sent to panel) [10388227] [16-16832, 16-16905] (KT) [Entered: 04/07/2017 01:31 PM]
04/06/2017	76	Received 7 paper copies of Reply Brief [54] filed by Seth Ravin and Rimini Street, Inc.. [10388263] [16-16832, 16-16905] (SD) [Entered: 04/07/2017 01:41 PM]

04/19/2017	77	Filed (ECF) Appellants Rimini Street, Inc. and Seth Ravin in 16-16832, 16-16905 citation of supplemental authorities. Date of service: 04/19/2017. [10401869] [16-16832, 16-16905] (Perry, Mark) [Entered: 04/19/2017 09:44 AM]
04/25/2017	78	Filed (ECF) Appellees Oracle America, Inc., Oracle International Corporation and Oracle USA, Inc. in 16- 16832, 16-16905 citation of supplemental authorities. Date of service: 04/25/2017. [10409822] [16-16832, 16-16905] (Clement, Paul) [Entered: 04/25/2017 10:53 AM]

05/03/2017	79	Notice of Oral Argument on Thursday, July 13, 2017 - 09:00 A.M. - Courtroom 1 - San Francisco CA. View the Oral Argument Calendar for your case here. Be sure to review the GUIDELINES for important information about your hearing, including when to arrive (30 minutes before the hearing time) and when and how to submit additional citations (filing electronically as far in advance of the hearing as possible). When you have reviewed the calendar, download the ACKNOWLEDGMENT OF HEARING NOTICE form, complete the form, and file it via Appellate ECF or return the completed form to: SAN FRANCISCO Office. [10420 714] [16-16832, 16-16905] (AKM) [Entered: 05/03/2017 01:55 PM]

05/04/2017	80	Filed (ECF) Acknowledgment of hearing notice. Location: San Francisco. Filed by Attorney Mr. Mark Andrew Perry for Appellants Seth Ravin and Rimini Street, Inc. in 16-16832, Attorney Mr. Mark Andrew Perry for Appellants Rimini Street, Inc. and Seth Ravin in 16-16905. [10421679] [16-16832, 16-16905] (Perry, Mark) [Entered: 05/04/2017 09:52 AM]
05/04/2017	81	Filed (ECF) Acknowledgment of hearing notice. Location: San Francisco. Filed by Attorney Mr. Paul D. Clement for Appellees Oracle America, Inc., Oracle International Corporation and Oracle USA, Inc. in 16-16832. [10421955] [16-16832, 16-16905] (Clement, Paul) [Entered: 05/04/2017 11:20 AM]
05/05/2017	82	Filed (ECF) Appellants Rimini Street, Inc. and Seth Ravin in 16-16832, 16-16905 Correspondence: re e-briefs. Date of service: 05/05/2017 [10424206] [16-16832, 16-16905] (Perry, Mark) [Entered: 05/05/2017 02:55 PM]

05/05/2017	83	Received Appellants Seth Ravin and Rimini Street, Inc. 4 copies of CDs containing hyperlinked versions of the opening, answering, and reply brief. Deficiencies: motion to transmit physical exhibits required. Notified counsel (See attached notice). [10426104] [16-16832, 16-16905] (KT) [Entered: 05/08/2017 02:43 PM]
05/09/2017	84	Filed (ECF) Appellants Rimini Street, Inc. and Seth Ravin in 16-16832, 16-16905 Unopposed Motion to transmit exhibit. Date of service: 05/09/2017. [10427865] [16-16832, 16-16905] (Perry, Mark) [Entered: 05/09/2017 02:30 PM]
05/12/2017	85	Filed clerk order (Deputy Clerk: AF): Appellants' Unopposed Motion for Leave to File CDs Containing EBriefs is GRANTED. [10432191] [16-16832, 16-16905] (AF) [Entered: 05/12/2017 10:17 AM]
05/12/2017	86	Filed Appellants Seth Ravin and Rimini Street, Inc. 4 copies of CDs containing hyperlinked versions of the opening, answering, and reply briefs. Served on 05/05/2017. Sent to panel. [10433064] [16-16832, 16-16905] (LA) [Entered: 05/12/2017 03:45 PM]

07/13/2017	87	ARGUED AND SUBMITTED TO SUSAN P. GRABER, MICHELLE T. FRIEDLAND and JEREMY D. FOGEL. [10507295] [16-16832, 16-16905] (TG) [Entered: 07/13/2017 11:32 AM]
07/13/2017	88	Filed Audio recording of oral argument. **Note:** Video recordings of public argument calendars are available on the Court's website, at http://www.ca9.uscourts.gov/media/ [10508139] [16-16832, 16-16905] (BJK) [Entered: 07/13/2017 04:59 PM]
10/11/2017	89	Filed (ECF) Appellant Rimini Street, Inc. in 16-16832, 16-16905 corporate disclosure statement. Date of service: 10/11/2017. [10614489] [16-16832, 16-16905] (Perry, Mark) [Entered: 10/11/2017 08:11 PM]

01/08/2018	90	FILED OPINION (SUSAN P. GRABER, MICHELLE T. FRIEDLAND and JEREMY D. FOGEL) The parties shall bear their own costs on appeal. AFFIRMED in Part, REVERSED in Part, VACATED and REMANDED in Part.. Judge: JF Authoring. FILED AND ENTERED JUDGMENT. [10715653] [16-16832, 16-16905] (RMM) [Entered: 01/08/2018 09:07 AM]
01/22/2018	91	Filed (ECF) Appellant Rimini Street, Inc. in 16-16832, 16-16905 petition for rehearing en banc (from 01/08/2018 opinion). Date of service: 01/22/2018. [10733949] [16-16832, 16-16905] (Perry, Mark) [Entered: 01/22/2018 11:45 PM]

01/24/2018	92	Filed order (SUSAN P. GRABER, MICHELLE T. FRIEDLAND and JEREMY D. FOGEL): Appellees are directed to file a response to the petition for rehearing en banc for Appellant Rimini Street, Inc., filed on January 22, 2018. The response shall not exceed 15 pages and shall be filed within 21 days of the filed date of this order. Parties who are registered for ECF must file the response electronically without submission of paper copies. Parties who are not registered ECF filers must file the original response plus 50 paper copies. [10736254] [16-16832, 16-16905] (AF) [Entered: 01/24/2018 09:51 AM]

02/14/2018	93	Filed (ECF) Appellees Oracle America, Inc., Oracle International Corporation and Oracle USA, Inc. in 16-16832, 16-16905 response to Petition for Rehearing En Banc (ECF Filing), Petition for Rehearing En Banc (ECF Filing) for rehearing by en banc only (all active, any interested senior judges), Order to set response by any party to anything, Order. Date of service: 02/14/2018. [10764600]. [16-16832, 16-16905] (Clement, Paul) [Entered: 02/14/2018 04:12 PM]
02/20/2018	94	Filed (ECF) Appellant Rimini Street, Inc. in 16-16832, 16-16905 Motion for miscellaneous relief [Motion for Leave to File Reply Brief in Support of Petition for Rehearing En Banc]. Date of service: 02/20/2018. [10769099] [16-16832, 16-16905] (Perry, Mark) [Entered: 02/20/2018 10:22 AM]
02/20/2018	95	Filed (ECF) Appellant Rimini Street, Inc. in 16-16832, 16-16905 reply to for rehearing by en banc only (all active, any interested senior judges),. Date of service: 02/20/2018. [10769110]. [16-16832, 16-16905] (Perry, Mark) [Entered: 02/20/2018 10:25 AM]

02/21/2018	96	Filed order (SUSAN P. GRABER, MICHELLE T. FRIEDLAND and JEREMY D. FOGEL): The "Motion of Appellant Rimini Street, Inc., for Leave to File Reply Brief in Support of Petition for Rehearing En Banc" is GRANTED. The reply brief tendered February 20, 2018, is ordered filed. [10771803] [16-16832, 16-16905] (AF) [Entered: 02/21/2018 01:42 PM]
03/02/2018	97	Filed order (SUSAN P. GRABER, MICHELLE T. FRIEDLAND and JEREMY D. FOGEL): Judges Graber and Friedland have voted to deny the petition for rehearing en banc for Appellant Rimini Street, Inc., and Judge Fogel has so recommended. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. The petition for rehearing en banc for Appellant Rimini Street, Inc., is DENIED. [10784028] [16-16832, 16-16905] (AF) [Entered: 03/02/2018 10:53 AM]

03/13/2018	98	MANDATE ISSUED. The parties shall bear their own costs on appeal. (SPG, MTF and JF) [10797161] [16-16832, 16-16905] (RR) [Entered: 03/13/2018 04:39 PM]
06/04/2018	99	**Supreme Court Case Info** Case number: 17-1625 Filed on: 05/31/2018 Cert Petition Action 1: Pending [10895008] [16-16832, 16-16905] (RR) [Entered: 06/04/2018 11:07 AM]
09/27/2018	100	**Supreme Court Case Info** Case number: 17-1625 Filed on: 05/31/2018 Cert Petition Action 1: Granted, 09/27/2018 [11027759] [16-16832, 16-16905] (HH) [Entered: 09/27/2018 02:07 PM]
10/03/2018	101	Filed (ECF) notice of appearance of John Anthony Polito for Appellees Oracle America, Inc., Oracle International Corporation and Oracle USA, Inc. in 16-16832, 16-16905. Date of service: 10/03/2018. [11034623] [16-16832, 16-16905] (Polito, John) [Entered: 10/03/2018 05:29 PM]

10/04/2018	102	Attorney Thomas S. Hixson, substituted by Attorney John Anthony Polito, [11034711] [16-16832, 16-16905] (CW) [Entered: 10/04/2018 07:07 AM]

United States District Court
District of Nevada (Las Vegas)
CIVIL DOCKET FOR CASE #: 2:10-cv-00106-LRH-VCF

Oracle USA, Inc. et al v. Rimini Street, Inc. et al
Assigned to: Judge Larry R. Hicks
Referred to: Magistrate Judge Cam Ferenbach
Case in other court: 9th Circuit Court of Appeals, 16-16832
9th Circuit Court of Appeals, 16-16905
9th Circuit, 18-16554
Cause: 17:101 Copyright Infringement

Date Filed: 01/25/2010
Date Terminated: 10/18 /2016
Jury Demand: Both
Nature of Suit: 820 Copyright
Jurisdiction: Federal Question

* * *

Date Filed	#	Docket Text
		* * *
10/13/2015	896	JURY VERDICT.(JC) (Entered: 10/14/2015)
		* * *
11/13/2015	917	MOTION for Attorney Fees *and Costs* by Plaintiffs Oracle America, Inc., Oracle International Corporation, Oracle USA, Inc.. Responses due by 11/30/2015. (Hixson, Thomas) (Entered: 11/13/2015)

11/13/2015	918	DECLARATION of Thomas S. Hixson in Support of Oracle's Motion for Costs and Attorneys' Fees re 917 Motion for Attorney Fees; by Plaintiffs Oracle America, Inc., Oracle International Corporation, Oracle USA, Inc.. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3-9, # 4 Exhibit 10, # 5 Exhibit 11, # 6 Exhibit 12, # 7 Exhibit 13- 21, # 8 Exhibit 22, # 9 Exhibit 23, # 10 Exhibit 24, # 11 Exhibit 25, # 12 Exhibit 26, # 13 Exhibit 27, # 14 Exhibit 28, # 15 Exhibit 29)(Hixson, Thomas) (Entered: 11/13/2015)
11/13/2015	919	DECLARATION of Kieran P. Ringgenberg in Support of Oracle's Motion for Costs and Attorneys' Fees re 917 Motion for Attorney Fees; by Plaintiffs Oracle America, Inc., Oracle International Corporation, Oracle USA, Inc.. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3-14)(Hixson, Thomas) (Entered: 11/13/2015)

11/13/2015	920	DECLARATION of James C. Maroulis in Support of Oracle's Motion for Costs and Attorneys' Fees re 917 Motion for Attorney Fees; by Plaintiffs Oracle America, Inc., Oracle International Corporation, Oracle USA, Inc.. (Attachments: # 1 Exhibit A-C) (Hixson, Thomas) (Entered: 11/13/2015)
11/13/2015	921	DECLARATION of Richard J. Pocker in Support of Oracle's Motion for Costs and Attorneys' Fees re 917 Motion for Attorney Fees; by Plaintiffs Oracle America, Inc., Oracle International Corporation, Oracle USA, Inc.. (Hixson, Thomas) (Entered: 11/13/2015)

* * *

11/30/2015	931	ERRATA to 917 Motion for Attorney Fees; filed by Plaintiffs Oracle America, Inc., Oracle International Corporation, Oracle USA, Inc.. (Hixson, Thomas) (Entered: 11/30/2015)

11/30/2015	932	Supplemental DECLARATION re 917 Motion for Attorney Fees; filed by Plaintiffs Oracle America, Inc., Oracle International Corporation, Oracle USA, Inc.. (Attachments: # 1 Exhibit 1 (Amended), # 2 Exhibit 2 (Amended), A, and B (filed under seal)*SEALED* per 940 ORDER)(Hixson, Thomas) Modified on 12/3/2015 to SEAL (MMM). (Entered: 11/30/2015)
11/30/2015	933	AMENDED Supplemental DECLARATION re 917 Motion for Attorney Fees; filed by Plaintiffs Oracle America, Inc., Oracle International Corporation, Oracle USA, Inc.. (Attachments: # 1 Exhibit 1 (Amended), # 2 Exhibit 2 (Amended))(Hixson, Thomas) (Entered: 11/30/2015)

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02/12/2016	996	SUPPLEMENT to 917 Motion for Attorney Fees; by Plaintiffs Oracle America, Inc., Oracle International Corporation, Oracle USA, Inc.. (Hixson, Thomas) (Entered: 02/12/2016)

* * *

03/08/2016	999	DECLARATION of Dennis L. Kennedy re 998 Response to Motion; filed by Defendants Seth Ravin, Rimini Street, Inc.. (Evanson, Blaine) (Entered: 03/08/2016)
03/08/2016	1000	DECLARATION of John L. Trunko re 998 Response to Motion; filed by Defendants Seth Ravin, Rimini Street, Inc.. (Attachments: # 1 Exhibit A, # 2 Exhibit B-1, # 3 Exhibit B-2, # 4 Exhibit B-3, # 5 Exhibit B-4, # 6 Exhibit C-1, # 7 Exhibit C-2, # 8 Exhibit C-3, # 9 Exhibit C-4, # 10 Exhibit D, # 11 Exhibit E-1, # 12 Exhibit E-2, # 13 Exhibit F, # 14 Exhibit G, # 15 Exhibit H, # 16 Exhibit I-1, # 17 Exhibit I-2, # 18 Exhibit J, # 19 Exhibit K, # 20 Exhibit L, # 21 Exhibit M, # 22 Exhibit N-1, # 23 Exhibit N-2, # 24 Exhibit N-3, # 25 Exhibit N-4, # 26 Exhibit O-1, # 27 Exhibit O-2, # 28 Exhibit O-3, # 29 Exhibit P-1, # 30 Exhibit P-2, # 31 Exhibit Q-1, # 32 Exhibit Q-2, # 33 Exhibit Q-3, # 34 Exhibit Q-4, # 35 Exhibit Q-5, # 36 Exhibit Q-6, # 37 Exhibit Q- 7, # 38 Exhibit Q-8, # 39 Exhibit Q-9, # 40 Exhibit Q-10)(Evanson, Blaine) (Entered: 03/08/2016)

03/08/2016	1001	DECLARATION of William G. Ross re 998 Response to Motion; filed by Defendants Seth Ravin, Rimini Street, Inc.. (Evanson, Blaine) (Entered: 03/08/2016)
03/08/2016	1002	DECLARATION of Timothy M. Opsitnick re 998 Response to Motion; filed by Defendants Seth Ravin, Rimini Street, Inc.. (Evanson, Blaine) (Entered: 03/08/2016)
03/08/2016	1003	DECLARATION of Thomas D. Vander Veen re 998 Response to Motion; filed by Defendants Seth Ravin, Rimini Street, Inc.. (Evanson, Blaine) (Entered: 03/08/2016)
03/08/2016	1004	DECLARATION of Robert H. Reckers re 998 Response to Motion; filed by Defendants Seth Ravin, Rimini Street, Inc.. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Exhibit N) (Evanson, Blaine) (Entered: 03/08/2016)

03/08/2016	1005	**OBJECTION to 917 Motion for Attorney Fees; filed by Defendants Seth Ravin, Rimini Street, Inc.. (Evanson, Blaine) (Entered: 03/08/2016)**

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ORACLE USA, INC., et al., Plaintiffs, vs. RIMINI STREET, INC., et al., Defendants.	Case No. 2:10-cv-00106-LRH-PAL **SEALED ORDER** (Mot Evidentiary Sanctions - Dkt. ##302, 307)

Before the court is Plaintiffs Oracle USA, Inc., Oracle America, Inc., and Oracle International Corporation's Motion for Evidentiary Sanctions (Dkt. ##302, 307). The court has considered the Motion; the Declaration of Kieran P. Ringgenberg in Support of Plaintiffs' Motion (Dkt. #303); Oracle's Appendix of Exhibits (Dkt. ##304, 308); Oracle's Appendix of Exhibits (Dkt. ##305, 309); Oracle's Appendix of Exhibits (Dkt. ##306, 310); Defendants' Opposition (Dkt. ##336, 338); Defendants' Opposition to Oracle's Motion for Evidentiary Sanctions for Spoliation (Dkt. ##336, 338); Plaintiffs' Reply (Dkt. ##355, 356); Declaration of Kieran Ringgenberg in Support of Reply (Dkt. ##357, 358)[1]; and the arguments of

[1] Two versions of each of these moving and responsive papers were filed; one under seal to protect confidential, proprietary information, and a second version redacted of

counsel at a hearing conducted July 17, 2012. Richard Pocker, Kieran Ringgenberg, James Maroulis and Darien Meyer appeared on behalf of the Plaintiffs. West Allen, Trent Webb, and Robert Reckers appeared on behalf of the Defendants.

BACKGROUND

I. The Complaint.

The Complaint (Dkt. #1) in this action was filed January 25, 2010. An Amended Complaint (Dkt. #36) was filed April 19, 2010. The Amended Complaint seeks damages and injunctive relief asserting claims for: (1) copyright infringement; (2) violations of the Federal Computer Fraud and Abuse Act ("FCFAA"); (3) violations of the Computer Data Access and Fraud Act ("CDAFA"); (4) violations of NRS 205.4765; (5) breach of contract; (6) inducing breach of contract; (7) intentional interference with prospective economic advantage; (8) negligent interference with prospective economic advantage; (9) unfair competition; (10) trespass to chattels; (11) unjust enrichment/restitution; (12) unfair practices; and (13) accounting. Oracle alleges that Rimini infringed its intellectual property by copying Oracle's PeopleSoft, J.D. Edwards and Siebel Software application programs. Rimini is alleged to provide cut-rate support for its customers using these applications through unlicensed copies of the software in the form of environments, and by cross-use, that is, using one of the customer's licensed software to support other customers. Oracle argues that Rimini's use of Oracle's software applications

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confidential, proprietary information which is available on the court's docket to the public.

infringes its copyrights. Oracle also claims that Rimini has infringed its Oracle Database which provides a foundation for applications.

II. Rimini's Answer and Counterclaim.

Rimini filed an Answer and Counterclaim (Dkt. #30) March 29, 2010, and an Answer to Oracle's First Amended Complaint and Counterclaim (Dkt. #46) May 6, 2010. The answer and counterclaim aver that Rimini is authorized by every one of its clients to perform work on their behalf and has delivered Oracle software and support materials only to clients who are entitled to them, and only within the scope of that client's entitlement. The answer and counterclaim allege that Rimini is authorized to possess copies of Oracle customer-licensed software by Oracle's customers. Rimini also claims that possessing and using copies of Oracle customer-licensed software is legal and an industry standard for third-party vendors like IBM, AT&T, Accenture, CedarCrestone, and others in the industry who work with the same Oracle customer-licensed software. Rimini maintains that Oracle initiated this litigation as an anti-competitive tactic to interfere with Rimini's after-market support services for enterprise software applications, including software applications licensed by Oracle. The counterclaim accuses Oracle of engaging in anti-competitive tactics to maintain after-market support business by effectively requiring Oracle customers to either continue purchasing after-market support from Oracle, or give up critical support materials the customer has paid for and is entitled to receive. The counterclaim asserts claims for: (1) defamation, business disparagement and trade libel; (2) declaratory judgment of unenforceability of copyright

misuse; and (3) unfair competition under Cal. Bus. & Prof. Code § 17200.

III. The Dispute.

A. Oracle's Motion for Evidentiary Sanctions.

In the current motion, Oracle seeks an order imposing evidentiary sanctions against Defendant Rimini and its CEO Seth Ravin for spoliation for deleting a "software library" containing digital copies of Oracle's copyrighted works. Oracle claims that in January 2010, Rimini employees affirmatively and irretrievably deleted the software library well after Rimini anticipated this lawsuit. As a result, Oracle asks that the court order an adverse inference sanction. Specifically. Oracle seeks an adverse inference instruction to permit the fact-finder to infer that the contents of the deleted software library would have supported Oracle's claims, including a rebuttable presumption of specific facts that the deleted evidence likely would have proved. In addition to a general adverse inference instruction, Oracle seeks the sanction of a rebuttable presumption of two sets of facts. First, Oracle asks that the fact-finder should presume at summary judgment and trial that Rimini copied into the software library a complete copy of each of Oracle's registered works corresponding to the name of the folders that Rimini deleted in January 2010. A list of each of the registered works for which Rimini is seeking a rebuttable presumption is included in the motion at pages 29 through 30. Second, Oracle seeks an order that the fact-finder should presume at summary judgment and trial that each of the 143 PeopleSoft environments (i.e. installed copies of PeopleSoft Software) that Rimini's interrogatory

responses claim were "built" were actually built using materials in the software library, and that Rimini lacks records to identify what software was used to build them.

Oracle's motion argues that Rimini anticipated this lawsuit well before the software library was deleted in January 2010. In December 2008, Rimini threatened Oracle with litigation claiming that Oracle had violated the antitrust laws and demanded that Oracle take steps to make it easier for Rimini to copy Oracle's intellectual property. Appendix of Exhibits (Dkt. #306), Exhibit 47, December 3, 2008, letter from counsel for Rimini, D. Goldfine to Jeffrey Ross, counsel for Oracle. Rimini's counsel sent a follow-up letter December 19, 2008. *Id.*, Exhibit 48, December 19, 2008, letter from Goldfine to Daniel Wall, counsel for Oracle.

Oracle's counsel responded December 23, 2008, stating Rimini's allegations of antitrust violations were baseless, and claiming that Rimini's massive downloading of Oracle's software and support materials was illegal. Appendix of Exhibits (Dkt. #305), Exhibit 40, December 23, 2008 letter from counsel for Oracle, Daniel Wall, to counsel for Rimini. Dan Goldfine. The letter demanded that Rimini "immediately take all necessary measures to preserve all documents, electronic records, and Support Materials that relate or bear witness to the access to and downloading of Oracle Support Materials that has occurred thus far." *Id.* The letter also expressed concern about the library it believed Rimini had compiled for the benefit of XO Communications which included material to a product family not licensed to or in use by XO Communications. *Id.* Oracle was concerned that

Rimini was using this material to support other customers in violation of Oracle's copyrights and licenses. *Id.*

At the deposition of Douglas Zorn, Rimini's Chief Financial Officer ("CFO") who was designated as a Rule 30(b)(6) witness, Oracle learned that Rimini had set aside funds in 2009, in anticipation of this lawsuit. Appendix of Exhibits (Dkt. #304), Exhibit 18, Excerpts of Zorn Deposition. Oracle's motion also argues that in June 2009, Rimini disclosed to investors that Oracle had threatened litigation. Additionally, in September 2009, Oracle claims that Rimini's CEO, Seth Ravin, resisted discovery in an action filed in the Northern District of California against SAP TN representing to the court that Oracle's true purpose in requesting the discovery from Ravin was "pre-complaint discovery" and "pre-litigation discovery" to obtain information for "use in a separate action against Rimini." Appendix of Exhibits (Dkt. #306), Exhibit 54, non-party Seth Ravin's and non-party Rimini Street's Opposition to Oracle's Motion to Compel in Case No. 2:09-cv-1591-KJD-GWF, related to Case No. 07-cv-01658-PJH(EDL) filed in the Northern District of California.

Oracle argues that Rimini has consistently and falsely claimed that: (1) Rimini maintains Oracle software and support materials in client-specific "data silos"; (2) Rimini did not "co-mingle" such material; and (3) a centralized library of materials never existed. Rimini made these claims in its answer and counterclaim and Ravin reiterated these claims when he was deposed in the SAP TN case filed in the Northern District of California. Oracle maintains that discovery conducted in this case

proves that these claims are false. Documents and deposition testimony establish that Rimini created and used a centralized network storage location containing Oracle software and support material that was not in customer-specific "data silos" but intermingled with material obtained from or on behalf of numerous different customers or no customer at all. Oracle claims these files were jumbled together with no obvious way of identifying the origin of each piece of software, and that Rimini employees routinely referred to it as the "software library."

Oracle obtained discovery in this case indicating that as early as mid-2006, Rimini began implementing the library by attempting to download the entire contents of PeopleSoft's Customer Connection website. Appendix (Dkt. #305), Exhibit 37. Mr. Chiu acknowledged at his June 24, 2011, deposition that this material could not possibly have been client-specific because Rimini did not have a single PeopleSoft customer at the time. Appendix of Exhibits (Dkt. 304), Exhibit 10, Excerpts of June 24, 2011, Chiu deposition; Exhibit 23, September 13, 2006, instant message between D. Chiu and S. Tahtaras. Oracle claims that discovery in this case has established that Rimini maintained a software library organized by product line rather than in client-specific "data silos." Although this was more efficient and required less storage than maintaining separate copies of software for each customer, it left Rimini with no clear record to identify the original source of the materials stored in the library. Oracle also claims that the software library was used to create environments to support customers, and that Rimini made no effort to identify the source of the original software when it built numerous

environments by copying software provided by or on behalf of different clients.

In early to mid-2009, Rimini reviewed its practices concerning Oracle's intellectual property after receiving Oracle's demand letters. Appendix of Exhibits (Dkt. #305), Exhibit 32, March 22, 2009, email from B. Slepko to K. Williams regarding Environment Builds forwarded to Chiu July 17, 2009. This email inquired how much more time it would take for Rimini to build each environment directly from the client's delivered software. In June 2009, Rimini announced it was going to "lock down the internal software directory." *Id.*, Exhibit 30, June 15, 2009, email from K. Williams to the Rimini Environments Team. In September 2009, Rimini announced that the software library was not going to be used any longer. Appendix of Exhibits (Dkt. #304), Exhibit 16, excerpts of October 5, 2011, Krista Williams deposition. Oracle claims that at least one Rimini employee complained about the change because it was significantly faster and more efficient to use the software library instead of using the customer's client-specific software files. Oracle argues that the only possible reason for this policy change was because Rimini was aware it was going to be sued by Oracle for cross-using software.

Oracle claims that Rimini continues to deny the extent of the software library and how it was used. Rimini also refuses to admit that the majority of environments built in 2006 through 2009, were built using software from the software library. *See* Appendix of Exhibits (Dkt. #304), Exhibit 7, Rimini's Second Amended Responses to Requests for Admissions Nos. 65 - 68. Oracle served Rimini with interrogatories seeking the contents and use of the

software library, and claims that Rimini's responses do not contain any list of software or otherwise clearly state the contents of the library. Oracle moved to compel complete responses, and Rimini claimed in opposition to the motion to compel that its responses were as full and detailed as Rimini could provide. *See* (Dkt. #167) Parties' November 4, 2011, Joint Case Management Conference Statement at 7-13. The undersigned granted Oracle's motion to compel to the extent of requiring Rimini to designate the deposition testimony of Krista Williams as Rimini's Rule 30(b)(6) testimony on these issues accepting Rimini's representation that this was the best answer that Rimini could provide, and that she had the level of detail that Rimini had. *See* Appendix of Exhibits (Dkt. #304), excerpts of November 8, 2011, status conference.

Rimini also responded to interrogatories asking that it identify what software was used to create each of Rimini's environments. In its Third Supplemental Responses to Interrogatories No. 20 - 22, Rimini admitted that it built some environments from the co-mingled software library, but could not identify which of them. Rather, Rimini's answers to interrogatories list 143 separate environments, relating to more than 100 customers indicating they were built using either the client's installation media or using stored installation media. *Id.*, Exhibit 5, Rimini's Answers to Interrogatories 20 - 22. Rimini also responded that it did not have records to identify all of the environments built from the software library. *Id.*

Rimini's damage expert opined that the measure of Oracle's damages is the value of labor saved by Rimini's challenged practices. Rimini's experts

offered opinions that an increase in portions of Rimini's staff would have permitted Rimini to avoid all of the challenged conduct, and the total cost of all additional labor since 2006, would be approximately 7 million dollars. Rimini reported more than 25 million dollars in revenues in 2010. Oracle claims that the accuracy of Rimini's 7 million dollar estimate of Oracle's damages depends, among other things, on the scope of Rimini's unlawful conduct, including the extent to which it used the software library, what the library contained, and how frequently it was used.

Oracle asserts Rimini engaged in spoliation by deleting the contents of the software library after it anticipated litigation in this case. Rimini clearly had a duty to preserve evidence relevant to Oracle's claims no later than January 2009, when it knew that litigation was more than a possibility. Because Rimini spoliated evidence by deleting the software library, spoliation remedies are appropriate. Oracle maintains that Rimini's deletion of the software library was intentional and willful because Rimini was on clear notice that the content of the software library was potentially relevant to this litigation before the software library was deleted. Oracle also argues that Rimini announced its change in policy regarding the use of the software library precisely because it predicted this lawsuit and understood that Oracle was going to sue Rimini for cross-use. Under these circumstances, the decision to delete the software library was an intentional affirmative act directed by Ms. Williams when she knew that in order to respect Oracle's intellectual property and licensing with former customers, Oracle was required not to share software between customers. In the Ninth Circuit, a finding of bad faith is not a

prerequisite to an adverse inference sanction and simple notice of potential relevance of the destroyed materials to the litigation is sufficient. Thus, it is no defense that Rimini deleted the software library to save storage space.

Oracle also contends that it has been substantially prejudiced by the deletion of the software library for several reasons. First, deletion of the library eliminated unequivocal proof of its complete contents. If the software library had not been deleted, Oracle could have examined its contents and shown that Rimini held copies of Oracle's copyrighted works. With that evidence, there would be no dispute that Rimini copied all of those works in the library, and that the library was not segregated into customer-specific "silos." Rimini admits that evidence of what the library contains is incomplete. Oracle has been forced to piece together evidence of what the library contained from emails and other documents produced in discovery. Additionally, Rimini's deponents have consistently attempted to undermine the limited evidence proving what was in the library by disputing that certain Oracle software was copied into the library.

Second, Oracle claims it was prejudiced by the deletion because the software library would likely have revealed additional information about the software's origin and use. The deleted electronically stored files should also contain metadata indicating, among other things, the dates on which the files were created, modified, and accessed. Oracle cannot establish exactly what metadata associated with the software library would have shown because it was deleted. However, Oracle believes it is highly likely the metadata would have revealed additional

information about the true source of the software and when it was created. Other courts have held that destroyed or altered metadata supports a finding of prejudice and the award of sanctions. The deletion of the software library deleted evidence of the scope of the software library–that is, what was copied into the library, and the extent to which the library was used. Oracle is prejudiced by this deleted evidence in its attempt to prove liability, and to challenge Rimini's experts' claims about damages.

Finally, Oracle argues that lesser sanctions would be inadequate to remedy the spoliation. Oracle believes more severe sanctions could be justified, and argues that it only asks the court to impose an adverse inference sanction to permit the fact finder to infer that the contents of the deleted software library would have supported Oracle's claims. The court should draft a rebuttable presumption instruction that the jury be allowed to infer that the deleted information would be helpful to Oracle and harmful to Rimini. The sanctions should include rebuttable presumptions that the fact finder should presume at summary judgment and trial that Rimini copied into the software library a complete copy of each of Oracle's registered works corresponding to the names of the folders that Rimini deleted in January 2010. It should also contain a rebuttable presumption that the fact finder should presume at summary judgment and at trial that each of the 143 PeopleSoft environments that Rimini's interrogatory responses say were built were actually built using materials in the software library, and that Rimini lacks records to identify what software was used to build them.

B. Rimini's Opposition.

Rimini opposes the motion accusing Oracle of manufacturing disputes based on misrepresentations and distorted facts. Rimini disputes that it deleted its internal software folder to exploit its absence during litigation. Rather, Rimini personnel made a complete record of the files in the internal software folder before it was deleted. Rimini offers to stipulate that Rimini's internal software folder did indeed include a complete copy of each of Oracle's registered works corresponding to the table included in Oracle's motion at pages 29 through 30. This stipulation will cure any prejudice Oracle might have suffered, and any additional evidentiary sanctions are unjustified both factually and legally.

Rimini maintains that no evidence of historic usage of the software library was stored in it. Rimini represents that it is easy to determine the types of metadata maintained by Rimini's servers and easy to verify that the servers did not maintain a log of historical file usage for the deleted software library as Oracle suggests. Rather, the metadata contained in the deleted files was limited to discreet items such as the date the file was created, and the last date the item was modified or accessed. This would not indicate how the files were used or for whom the files were stored, accessed, or modified. Rimini maintains that a number of the 143 environments listed in Oracle's motion were created **after** the software folder was deleted, making it impossible for those environments to have been created using the deleted files.

Under these circumstances, it is inappropriate to give an adverse inference instruction based on speculation about what the deleted materials would

have established. Rimini argues that it merely deleted an obsolete folder of software after the contents of the folder were recorded. Rimini offers to stipulate to the accuracy of these records. As the contents of the deleted folder are not in dispute, the folder's deletion does not warrant the broad and highly prejudicial inferences Oracle seeks.

Rimini concedes that it anticipated potential litigation with Oracle in January 2010. Rimini agrees that Oracle should be restored to the same position it would have been in absent the deletion of the software folder. However, the sanctions Oracle suggests go far beyond putting Oracle in the same position it would have been in but for the deletion of the folder.

Rimini also disputes that the software library was a jumbled collection of Oracle materials cross-used regardless of the clients' scope of entitlement. Rather, Rimini maintains that the software folder contained copies of PeopleSoft installation media and was organized by software releases so that Rimini personnel could easily determine which clients were entitled to the stored media. Multiple clients are licensed by Oracle to the same software, and license rights are not tied to specific installation media. Rimini cites testimony of numerous witnesses that have explained that Rimini implemented strict procedures to ensure that clients only receive the benefit of the software from the internal folder that the client had actually licensed from Oracle. By following these procedures, Rimini operates within the scope of the clients' license rights.

Rimini also claims that Ms. Williams inquired whether the internal software folder should be deleted to reclaim disk space for other folders

because "this repository shouldn't be needed or even used." (Dkt. #309), Oracle Exhibit 25. Ms. Williams requested authorization from Mr. Chiu, her supervisor, who authorized the deletion. Ms. Williams then documented the materials that were to be deleted, and submitted the request to the IT Department. This evidence speaks for itself and demonstrates the lack of any improper motive on the part of Ms. Williams, Mr. Chiu, or any other Rimini employee.

Rimini also disputes that it has attempted to take advantage of gaps in the record created by its deletion of the software folder. Rimini acknowledges that a former employee, Mr. Corpuz, and other Rimini deponents could not testify regarding the internal software folder. Mr. Corpuz repeatedly stated that he could not recall, didn't know, or didn't remember the email that was shown to him at his deposition. However, Rimini claims Mr. Corpuz did not deny the existence of the internal software folder. Additionally, the fact that certain other Rimini deponents could not testify regarding the internal software folder does not indicate Rimini engaged in deception. The internal software folder was principally used by Rimini's PeopleSoft environment group, and the first witness Oracle deposed from that group, Ms. Williams, testified extensively on this topic. Rimini represented to the court during the November 8, 2011, hearing, that Ms. Williams is the most knowledgeable Rimini employee concerning the internal software folder.

Rimini also claims that it has never kept records identifying which environments were built from the internal software folder. This lack of information is not because Rimini deleted the software library, but

because Rimini never maintained such records. Ms. Williams testified at her deposition that if she wanted to determine how an environment was built, she would look at "e-mail traffic" or other Rimini documentation. Rimini argues that it has provided Oracle with all the information it has regarding the ultimate source of its environments, and that the undersigned ruled this was adequate in deciding Oracle's motion to compel.

Rimini also contends that Oracle's argument that the scope and extent of Rimini's use of the software library might impact the accuracy of the damages model of Rimini's damages expert is flawed. This is because Rimini's damages model already assumes that Rimini conducted operations without an internal share folder. Rimini has operated without such a folder for the last several years, so it was easy for Rimini's experts to understand the costs associated with environment builds made without an internal software folder.

Rimini asserts that Oracle is not prejudiced by the missing metadata from the deleted software library because the metadata did not maintain a log of historical file usage that Oracle claims. To support a sanction for an adverse inference, the movant must present some evidence corroborating a claim that the missing evidence would have been favorable to the movant's case. In this case, "Oracle's hypothesized uses for the metadata, however, are uncorroborated, speculative, refuted by the existing evidence, and thus, cannot support its requested inferences." Opposition 10:9-11.

Rimini supports its arguments that the metadata would not show the origin and use of the software with the declaration of Chris Galotze. Galotze avers

that the metadata maintained for the deleted files was standard Microsoft Windows® metadata that would show only the last time a file was used, not every time a file was used. *See* Galotze Declaration (Dkt. #307), Exhibit 25, ¶4. The metadata would not indicate who used the software or for what purpose. *Id.* The metadata associated with the missing files does not include a running list of every date that the file was accessed. *Id.* Rather, the metadata would only contain the date the file was last accessed or modified. *Id.*

The information that could have been gleaned from the metadata from the deleted folder would be of limited probative value, Rimini argues, because it would give no information about who was accessing the software or whether it was being used to create a particular environment. Thus, Oracle's arguments that the missing metadata might allow them to determine the source of Rimini's environments is speculative and does not support Oracle's overly-broad adverse inference instructions. The metadata kept by the Windows® Server operating system is well known. Galotze Declaration at ¶1-4. Rimini also argues that Oracle seeks adverse inferences regarding numerous facts that cannot be possibly be true. For example, Oracle requests an adverse inference instruction that includes numerous environments created after Rimini's internal share folder was deleted. Rimini has identified all environments created after Rimini discontinued use of the internal share folder, and Oracle has not disputed the accuracy of this list. Nevertheless, Oracle seeks an adverse inference instruction about the numerous environments created after January 2010, when the folder was deleted which is impossible. Oracle should not be given an adverse

inference instruction for facts that cannot possibly be true.

Oracle also contends that any prejudice Oracle suffered by the deletion of the software folder will be remedied by its stipulation that complete copies of the identified software were included in the deleted files. With this stipulation, Oracle is no longer required to prove what software was copied into the library. Additionally, because Rimini has produced all available discovery regarding the use of its software library and the creation of its environments, Oracle has ample evidence to prove when software was copied out of the library and is not prejudiced by the deletion of the folder.

Because any prejudice to Oracle will be fully and completely remedied by Rimini's stipulation and production of other evidence, there is no need for additional adverse inference instructions. Adverse inference instructions are powerful tools in a jury trial and brand a party as a bad actor. There is no evidence that Rimini acted in bad faith when it deleted the obsolete folder, and given the complete lack of prejudice to Oracle and the lack of bad faith on Rimini's part, the probative value of Oracle's requested instruction would be substantially outweighed by the danger of unfair prejudice to Rimini. The purpose of an adverse inference instruction is to restore the prejudiced party to the same position it would have been in, and Oracle's requests for adverse inference instructions seek to put it in a better position by wrongfully capitalizing on the deletion to malign Rimini in front of the jury. For all of these reasons, Oracle's request for an adverse inference instruction should be denied.

C. Oracle's Reply.

Oracle replies that Rimini has conceded that it maintained a centralized software library used to provide support to its PeopleSoft customers, deleted this library in January 2010, and that it reasonably anticipated this litigation at the time the library was deleted. Oracle argues that Rimini's assertion that the software library was innocently deleted is contradicted by its representations to this court and Rimini's customers. Because Rimini concedes that it intentionally deleted the library which knowledge it was relevant to anticipated litigation, the deletion was willful under settled Ninth Circuit law. Moreover, Rimini has consistently misrepresented that the library never existed. Under these circumstances, Rimini has failed to rebut overwhelming evidence of bad faith and adverse inference instructions are appropriate.

Oracle also argues that Rimini's proposed stipulation falls far short of filling the hole in the record left by Rimini's spoliation. The proposed stipulation only touches on one of the three remedies Oracle requested concerning a rebuttable presumption regarding the contents of the library. It does not address all the potentially relevant data that was lost, or cure any prejudice Oracle may have incurred from deletion of the folder. Oracle claims that Rimini repeatedly and falsely claimed that the software library did not exist, and when confronted with evidence to the contrary, changed its story. Rimini now claims, for the first time, that its personnel made a complete record of the files before deletion. However, Rimini's response to Oracle's motion does not explain why this complete record of files was not produced or identified in response to

Oracle's discovery requests which generated the motion to compel the court previously granted. Under these circumstances, Oracle argues there is no reason to accept Rimini's claim that the deleted metadata is not important. At a minimum, the metadata fields would have shown the dates that particular files in the software library were created, *i.e.*, copied into the library, and the last date accessed, *i.e.*, last copied out of the library. This would be powerful evidence regarding Rimini's use of Oracle's copyrighted software because it would show whether (1) Rimini downloaded PeopleSoft software to the library before Rimini had any PeopleSoft customers, and (2) some if not many or all of specified client environments were created by copying software obtained from or for other customers.

Oracle acknowledges that whenever a party wilfully destroys evidence, there will always be some uncertainty about what the deleted evidence would have proved. However, Rimini should not be able to capitalize on that uncertainty by claiming Oracle is only speculating that the deleted evidence would have supported Oracle's claims. The evidence that Rimini did not destroy shows the deleted evidence would have been relevant to resolving significant factual issues, which is more than an adequate legal basis to award what Oracle characterizes as "modest relief."

Oracle emphasizes that in the Ninth Circuit, a finding of bad faith is not a prerequisite to an adverse inference instruction. However, it argues that there is ample evidence in the record to conclude that Rimini's deletion was in bad faith because Mr. Chiu and Ms. Williams decided to delete the library

when time they were fully informed about the software library, knew that its use was illegal, and understood that as long as it existed, it represented evidence that would support Oracle's anticipated litigation against Rimini. Evidence in the record concerning Rimini's decision to cease use of the library, Rimini's statements to its customers, and Rimini's denial of the existence of the library in pleadings and depositions in this case is consistent with an awareness that the use of the software library was improper.

DISCUSSION

I. Spoliation Sanctions.

Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending, or reasonably foreseeable litigation. *United States v. Kitsap Physicians Sys.*, 314 F.3d 995, 101 (9th Cir. 2002) (citing *Akiona v. United States*, 938 F.2d 158, 161 (9th Cir. 1991)). A party engages in spoliation as a matter of law only if it had some notice that the evidence was potentially relevant to the litigation before it was destroyed. *Id.* A party has a duty to preserve evidence it knows or should know is relevant to a claim or defense of any party, or that may lead to the discovery of relevant evidence. *Id.*; *see also In re: Napster*, 462 F.Supp.2d 1060, 1067 (N.D.Cal. 2006). When a potential claim is identified, a litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action. *Id.* (citing *National Association of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 556-57 (N.D. Cal. 1987)).

A trial court has broad discretion in determining a proper sanction for spoliation, including outright dismissal of the lawsuit. *See Chambers v. NASCO, Inc.*, 501 U.S. 32 45 (1991). Additionally, "[a] federal trial court has the inherent discretionary power to make appropriate evidentiary rulings in response to the destruction or spoliation of relevant evidence." *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993). The court has the discretion to sanction a responsible party by instructing the jury that it may infer the spoliated evidence would have been unfavorable to the responsible party. *Id.* A finding of "bad faith" is not a prerequisite to an adverse inference instruction. *Id.* (citing *Unigard Sec. Ins. Co. v. Lakewood Engineering & Manufacturing Corp.*, 982 F.2d 363, 368-70 & n.2). An adverse inference instruction may be given upon a finding that the evidence was destroyed after a party was on notice of the potential relevance of the evidence to the litigation. *Id.* The Ninth Circuit has held that a trial court's "adverse inference sanction should be carefully fashioned to deny the wrongdoer the fruits of its misconduct yet not interfere with that party's right to produce other relevant evidence." *In re: Oracle Corp. Securities Litigation*, 627 F.3d 376, 386 (9th Cir. 2010). The Ninth Circuit reviews a district court's exercise of its discretionary power to impose spoliation sanctions for an abuse of discretion. *Id.* at 386.

In examining a spoliation claim, the court determines whether destruction or failure to preserve evidence results in prejudice to the opposing party. *Leon v. IDX Systems Corp.*, 464 F.3d 951, 959 (9th Cir. 2006). In determining whether a party has been prejudiced by spoliation, the court inquires whether the spoliating party's destruction of

evidence impairs the non-spoliating party's ability to go to trial or threatens to interfere with the rightful decision of the case. To be actionable, the spoliation of evidence must damage the right of a party to bring an action. *Ingram v. United States*, 167 F.3d 1240, 1246 (9th Cir. 1999) (citing *Unigard*, 982 F.2d at 371). In *Anheuser-Busch*, the Ninth Circuit found prejudice when a party's refusal to provide certain documents "forced Anheuser to rely on incomplete and spotty evidence" at trial. 69 F.3d at 354.

In *Akiona v. United States*, the Ninth Circuit explained the twin rationales for permitting the trier of fact to draw an adverse inference from the destruction of evidence relevant to a case. The evidentiary rationale for an adverse inference is based on "the common sense observation" that a party who has notice that evidence is relevant to litigation and destroys the evidence is more likely to have been threatened by the evidence than is a party in the same position who does not destroy evidence. *Akiona*, 938 F.2d at 161. There is also a deterrence rationale for permitting the trier of fact to draw an adverse inference from the destruction of evidence because an adverse inference instruction punishes a party for wrongdoing and is intended to deter others from destroying relevant evidence. *Id.*

II. Analysis.

Rimini concedes that it anticipated litigation with Oracle in January 2010, well before the internal software library was deleted. Rimini does not dispute that the library contained information potentially relevant to this litigation. Rather, Rimini argues that destruction of the software library is not prejudicial to Oracle because Rimini will stipulate that Rimini's internal software folder included a complete copy of

each of Oracle's registered works corresponding to the table included in Oracle's motion at pages twenty-nine through thirty. Rimini also argues that Oracle is not prejudiced by the deletion of the software library because metadata maintained for the deleted files was standard Microsoft Windows metadata that would only show the date the file was created and the last date the file was modified or accessed. The metadata did not show historic usage of the software library such as how the files were used or for whom the files were stored, accessed, or modified. Additionally, Rimini contends that Oracle is not prejudiced by deletion of the software library because Rimini never maintained records identifying which environments were built using the internal software folder. Rimini cites Ms. Williams' deposition testimony that she would look at email traffic or other Rimini documentation to determine how an environment was built and represents that Rimini provided Oracle with all the information it has regarding the ultimate source of its environments. Finally, Rimini argues Oracle is not prejudiced in its ability to analyze Rimini's damages model because Rimini has operated without the internal software library since it was deleted in January 2010. Thus, it was easy for Rimini's experts to understand the costs associated with environment builds made without an internal software folder.

The court finds that Rimini spoliated evidence when it deleted the software library in January 2010. The deletion was authorized by the Vice President of On Boarding, Mr. Chiu, who is responsible for client transition to Rimini support. On January 12, 2010, Rimini employee Krista Williams emailed Mr. Chiu that she had come across the "repository of software" that had "served as a sort of software media library."

Appendix of Exhibits (Dkt. #305) at Exhibit 25. Ms. Williams asked Mr. Chiu if she should "ask IT to clear it out" citing a desire to free storage space. *Id.* Mr. Chiu agreed, responding "that was our original network share location before we had the customer drives. Would you mind submitting the IT request to have that deleted?" *Id.* On January 13, 2010, Ms. Williams sent IT specific instructions for deletion of the library. *Id.* at Exhibit 34. Ms. Williams' January 13, 2010, email to IT directed the deletion of directories on rsi-cisvrO. *Id.* The email attached an image of the folders to be deleted. At least thirty-three folders were deleted including folders named for numerous versions of various PeopleSoft applications and related software and documentation. *Id.*

Two months after these folders were deleted, Rimini filed an Answer and Counterclaim (Dkt. #30) on March 29, 2010. In its counterclaim, Rimini alleged that Oracle's software and support materials were stored in client-specific "data silos," were not co-mingled, and that a co-mingled software library "never existed" at Rimini. *See* Answer and Counterclaim (Dkt. #30) ¶¶ 4, 19, 33, 34, 48 and 40. Rimini's answer and counterclaim specifically denied that it stockpiled a library of Oracle's intellectual property to support its present and prospective customers and claimed that such a library never existed at Rimini. *Id.* at ¶34.

The court finds that Rimini's deletion of the software library was willful, in the sense that it was intentionally deleted well after Rimini was on notice of potential litigation with Oracle regarding Rimini's use of Oracle's copyrighted software. Further, it was deleted when Rimini knew or reasonably should have

known that evidence from the software library was potentially relevant to this litigation. Additionally, the court finds that Oracle has been prejudiced by the deletion of the software library. However, the court also finds that Rimini's offer to stipulate that the deleted software library included a complete copy of Oracle's copyrighted software in dispute in this litigation will remedy any prejudice stemming from a lack of proof of what copies of Oracle's copyrighted works were maintained in the library. Rimini's offer to stipulate provides Oracle with a greater remedy than the rebuttable presumption sanction that Oracle requested in the motion.

The court also finds that deletion of the software library is prejudicial to Oracle because it has been denied evidence about the use of the library and the creation of client environments in dispute in this litigation. Rimini's opposition to the motion represents that metadata from the deleted software library did not contain a log of historical usage, only the date created and the last date the file was accessed or modified. Given Rimini's initial denial that it ever maintained a software library, the court understands Oracle's reservations about the veracity of these representations. However, accepting them as true does not mean that the information that did exist would not be relevant or helpful in proving Oracle's claims. Oracle alleges that Rimini downloaded and used Oracle's PeopleSoft software without authorization and stored PeopleSoft software in a centralized software library to build environments for Rimini's customers. Oracle also claims that Rimini used installation media/software obtained for some of Rimini's customers to build environments for other customers. Oracle refers to this as "cross-use." Oracle maintains that cross-use

of its software violated license agreements with its customers because each client's license rights were tied to a specific installation media. The court agrees with Oracle that at a minimum, the metadata from the deleted software library would have shown the dates that particular files in the software library were created or copied into the library and the last date they were accessed or copied out of the library. The court is also persuaded by Oracle's arguments that this would provide evidence of Rimini's use of Oracle's copyrighted software because it would show whether (1) Rimini downloaded PeopleSoft software to the library before Rimini had any PeopleSoft customers, and (2) whether at least some of specified client environments were created by copying software obtained from or for other customers.

The court will therefore grant Oracle's motion for spoliation sanctions and order that the jury be instructed that Rimini had a complete copy of each of Oracle's registered works identified on pages twenty-nine through thirty of Oracle's motion in its software library. The court will also grant Oracle's request for an adverse inference instruction to the jury that Rimini breached its duty to preserve relevant evidence when it deleted the software library in January 2010, knowing that Oracle was likely to file a lawsuit against it for alleged illegal activity in copying and using Oracle's software, and knowing the software library contained evidence potentially relevant to this lawsuit.

However, Oracle overreaches when it requests spoliation sanctions in the form of a rebuttable presumption that each of the 143 PeopleSoft environments that Rimini's interrogatory responses claim were built were actually built using materials

in the software library and that Rimini lacks records to identify what software was used to build them. It is undisputed that many of these environments were built after the 2010 deletion of the software library. It is also undisputed that Rimini has produced some records which identify what software was used to build some of the environments. The records are "spotty and incomplete", but it is simply not true that Rimini has no records.

For the reasons stated,

IT IS ORDERED that:

1. Oracle's Motion for Evidentiary Sanctions (Dkt. ##302, 307) is **GRANTED in part** and **DENIED in part.**

2. The motion is **GRANTED** to the extent that Oracle shall not be required to prove, and it shall be conclusively established, that Rimini had a complete copy of Oracle's registered works in its deleted software library folder. Specifically, the jury shall be instructed that Rimini had a complete copy of each of the following Oracle Registered Works in its software library:

    a. PeopleSoft Customer Relationship Management Version 8.8;

    b. PeopleSoft Customer Relationship Management Version 8.9;

    c. PeopleSoft Electronic Performance Management Version 8.8;

    d. PeopleSoft Electronic Performance Management Version 8.9;

e. PeopleSoft Financials and Supply Chain Management Version 8.4 Service Pack 2;

f. PeopleSoft Financials and Supply Chain Management Version 8.8 Service Pack 1;

g. PeopleSoft Financials and Supply Chain Management Version 9;

h. PeopleSoft Human Resources Management System Version 8 Service Pack 1;

i. PeopleSoft Human Resources Management System Version 8.3 Service Pack 1;

j. PeopleSoft Human Resources Management System Version 8.8 Service Pack 1;

k. PeopleSoft Human Resources Management System Version 8.9;

l. PeopleSoft Human Resources Management System Version 9.0;

m. Each of the separately registered versions of PeopleBooks alleged in this action;

n. People Tools Version 8.21;

o. People Tools Version 8.22;

p. People Tools Version 8.42;

q. People Tools Version 8.45;

r. People Tools Version 8.46;

s. People Tools Version 8.47;

t. People Tools Version 8.48; and

u. People Tools Version 8.49.

3. The motion is **GRANTED** to the extent that the jury should be instructed that Rimini breached its duty to preserve relevant evidence when it deleted the software library in January 2010, knowing that Oracle was likely to file a lawsuit against it based on claims that Rimini was impermissively using Oracle's registered copyright software and knowing that the software library contained evidence potentially relevant to Oracle's anticipated lawsuit. The jury shall be instructed that it may, but is not required, to infer that the software library contained evidence that was favorable to Oracle's claims and unfavorable to Rimini's claims and defenses in this case.

4. The motion is **DENIED** in all other respects.

Dated this 29th day of March, 2013.

s/ Peggy A. Leen
Peggy A. Leen
United States Magistrate Judge

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ORACLE USA, INC.; et al., Plaintiffs, v. RIMINI STREET, INC., a Nevada corporation; SETH RAVIN, an individual, Defendants.	2:10-CV-00106-LRH-PAL ORDER

Before the court is plaintiffs Oracle USA, Inc.; Oracle America, Inc.; and Oracle International Corporation's (collectively "Oracle") motion for partial summary judgment on their first cause of action for copyright infringement and on defendant Rimini Street, Inc.'s ("Rimini") second, third, and sixth affirmative defenses. Doc. #237.[1] Defendant Rimini filed an opposition 1 (Doc. #259) to which Oracle replied (Doc. #281).

I. Facts and Procedural History

Oracle develops, manufacturers, and licenses computer software, including Enterprise Software programs[2]. Oracle is the current owner and/or

[1] Refers to the court's docket entry number.

[2] Enterprise Software is a type of computer software program that enables core operational tasks - like payroll, human resource tasking, and inventory management - across

exclusive licensee for various PeopleSoft, J.D. Edwards, and Siebel-branded Enterprise Software products. Rather than sell the software outright, Oracle licenses the use of the software to customers through software licensing agreements. Oracle also provides software support services to its customers, if requested, through separate software support service contracts.

Defendant Rimini is a company that provides similar software support services to customers licensing Oracle's Enterprise Software programs and competes directly with Oracle to provide these services.

On January 25, 2010, Oracle filed a complaint alleging that Rimini copied several of Oracle's copyright protected software programs onto its own computer systems in order to provide software support services to its customers. In its complaint, Oracle alleges thirteen separate causes of action against Rimini: (1) copyright infringement; (2) violation of the Federal Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. §§ 1030(a)(2)(C), (a)(4), & (a)(5); (3) violation of the California Computer Data

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an entire organization. Instead of being tied to a specific computer, Enterprise Software is hosted on a server and provides simultaneous access and service to a large number of users over a computer network. These features and functions are in contrast to typical computer software, which is generally a single-user application executed on a user's personal computer.

A key feature of Enterprise Software is the ability to modify and customize the software for an entity's specific needs and to support the software through periodic software and regulatory updates to maintain the software's continuing functionality.

Access and Fraud Act ("CDAFA"), Cal. Penal Code § 502; (4) violation of Nevada Revised Statutes ("NRS") § 205.4765; (5) breach of contract; (6) inducement of breach of contract; (7) intentional interference with prospective economic advantage; (8) negligent interference with prospective economic advantage; (9) unfair competition; (10) trespass to chattels; (11) unjust enrichment; (12) unfair practices; and (13) accounting. Doc. #1.

On March 29, 2010, Rimini filed an answer contesting Oracle's claims and alleging three counterclaims: (1) defamation, business disparagement, and trade libel; (2) copyright misuse; and (3) unfair competition in violation of California Business and Professional Code, Cal. BPC. § 17200. Doc. #30. Rimini also raised eleven affirmative defenses to Oracle's claims: (1) invalid copyrights; (2) express license; (3) consent of use; (4) copyright misuse; (5) improper registration; (6) implied license; (7) merger; (8) statute of limitations; (9) laches; (10) fair use; and (11) limitations on exclusive rights of computer programs under 17 U.S.C. § 117. *Id.*

In April 2010, Oracle filed an amended complaint (Doc. #36) to which Rimini filed an amended answer (Doc. #46) and a motion to dismiss (Doc. #48). On August 13, 2010, the court granted in-part and denied in-part Rimini's motion, dismissing Oracle's eighth cause of action for negligent interference with prospective economic advantage. Doc. #78.

In response to Rimini's amended answer, Oracle filed a motion to dismiss certain of Rimini's counterclaims and affirmative defenses. Doc. #67. On October 29, 2010, the court granted in-part and denied in-part Oracle's motion, dismissing several defamation allegations from Rimini's first

counterclaim for defamation and dismissing the entirety of Rimini's fourth affirmative defense for copyright misuse. Doc. #111.

In June 2011, Oracle filed a second amended complaint. Doc. #146. In response, Rimini filed its second amended answer raising six additional affirmative defenses: (12) contract defense; (13) privilege; (14) economic interest; (15) consent; (16) preemption; (17) lack of contract; and (18) mitigation of damages. Doc. #153. Thereafter, Oracle filed the present motion for partial summary judgment on its first cause of action for copyright infringement and on Rimini's second, third, and sixth affirmative defenses. Doc. #237.

II. Legal Standard

Summary judgment is appropriate only when the pleadings, depositions, answers to interrogatories, affidavits or declarations, stipulations, admissions, and other materials in the record show that "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In assessing a motion for summary judgment, the evidence, together with all inferences that can reasonably be drawn therefrom, must be read in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001).

The moving party bears the initial burden of informing the court of the basis for its motion, along with evidence showing the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). On those issues for which it

bears the burden of proof, the moving party must make a showing that is "sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party." *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986); *see also Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1141 (C.D. Cal. 2001).

To successfully rebut a motion for summary judgment, the non-moving party must point to facts supported by the record which demonstrate a genuine issue of material fact. *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 738 (9th Cir. 2000). A "material fact" is a fact "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Where reasonable minds could differ on the material facts at issue, summary judgment is not appropriate. *See v. Durang*, 711 F.2d 141, 143 (9th Cir. 1983). A dispute regarding a material fact is considered genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Liberty Lobby*, 477 U.S. at 248. The mere existence of a scintilla of evidence in support of the party's position is insufficient to establish a genuine dispute; there must be evidence on which a jury could reasonably find for the party. *See id.* at 252.

III. Discussion

This motion concerns Oracle's first cause of action for copyright infringement and Rimini's second affirmative defense for express license, third affirmative defense for consent of use, and sixth affirmative defense for implied license. *See* Doc. #237. Oracle's claim for copyright infringement, as it relates to the present motion, arises from Rimini's

copying of Oracle's copyright protected PeopleSoft, J.D. Edwards, and Siebel-branded Enterprise Software programs on Rimini's company systems in order to provide software support services to four separate customers: the City of Flint, Michigan ("City of Flint"); the school district of Pittsburgh, Pennsylvania ("Pittsburgh Public Schools"); Giant Cement Holding, Inc. ("Giant Cement"); and Novell, Inc. ("Novell"). Each customer is a licensee of at least one of Oracle's copyright protected Enterprise Software programs, but receives software support services from Rimini. In its motion for summary judgment, Oracle has identified the following licensed software products, registered copyrights, and alleged infringing copies of the licensed software for each customer:

Customer	**Enterprise Software Product**	**Copyrights** [3]	**Infringing Copy**
City of Flint	PeopleSoft HRMS 7.5 PeopleTools 7.5	TX 4-792-575 TX 4-792-578	H751COFO #1 H751COFO #2 H751COF2 H751DEVO H751AUC

[3] To reduce the number of copyright registrations at issue in this action, the parties have stipulated (and the court has so ordered) that the protected expression in later releases and versions of the PeopleSoft, J.D. Edwards, and Siebel-branded software programs includes the protected expression contained in earlier releases and versions of the software. *See* Doc. #149.

Customer	Enterprise Software Product	Copyrights [3]	Infringing Copy
Pittsburgh Public Schools	PeopleSoft HRMS 8.3 PeopleTools 8.10 PeopleSoft FSCM 8.4 PeopleTools 8.48	TX 5-469-032 TX 5-266-221 TX 5-586-247 TX 7-092-819	H831PPSM H831PPS2 F842PPSM #1 F842PPSM #2
Giant Cement	JD Edwards EnterpriseOne 8.10	TX 6-541-038	JGEHE5TSA1
Novell	Siebel 7.7.1	TX 6-941-993	NOVELL-AP01 NOVELL-CLI

As addressed in detail below, Rimini concedes in its opposition that it copied the identified copyrighted software programs to create the allegedly infringing development environments[4] on its company systems so that it could develop and test software updates for its customers. *See generally*

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[4] In order to develop and test software updates for Enterprise Software, support service providers (like Oracle and Rimini) create development environments of the software. A development environment is a software environment that contains a copy of the software program which is then modified to develop and test software updates. Given the critical nature of Enterprise Software programs, updates to the software must be fully tested and verified in a development environment before they are provided to a customer.

Doc. #259. However, Rimini argues that its copying of the software was authorized (1) by the express language of Oracle's customer software licensing agreements, and/or (2) implicitly by Oracle's conduct and consent in shipping back-up copies of the licensed software's installation media to Rimini's facilities. The court shall address the parties' claims and affirmative defenses below.

A. Copyright Infringement (First Cause of Action)

To establish a prima facie case of copyright infringement, Oracle must show (1) ownership of the relevant copyrights, and (2) copying of protected expression by Rimini. *Range Road Music, Inc. v. East Coast Foods, Inc.*, 668 F.3d 1148, 1153 (9th Cir. 2012); *Funky Films, Inc. v. Time Warner Entm't Co.*, 462 F.3d 1072, 1076 (9th Cir. 2006).

Here, it is undisputed that Oracle is the owner and/or exclusive licensee of the eight registered copyrights at issue in this motion. *See* Doc. #238, Adler Decl., Exhibits 1-9. Further, it is undisputed, and Rimini concedes in its opposition, that it copied Oracle's copyright protected software when it built development environments for the four customers at issue in this motion. *See generally* Doc. #259. Based on these undisputed facts, the court finds that Oracle has established a prima facie case of copyright infringement. *See e.g., Triad Sys. Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1335 (9th Cir. 1995) (prima facie case of copyright infringement found where defendant was "copying [plaintiff's] entire [computer] programs" in order to provide software and maintenance support); *MAI Sys. Corp. v. Peak Computer Corp.*, 991 F.2d 511, 517-519 (9th Cir. 1993) (affirming summary

judgment on the claim of copyright infringement where defendant copied plaintiff's software onto its systems to provide competing software maintenance services).

However, Oracle's claim of copyright infringement is subject to Rimini's challenged affirmative defenses of express license, implied license, and consent. Therefore, the court must address each affirmative defense before determining whether Oracle is entitled to summary judgment on this claim.

B. Express License (Second Affirmative Defense)

Express license is an affirmative defense. *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1114 (9th Cir. 2000). As the party alleging the affirmative defense, Rimini has the initial burden to identify any license provision(s) that it believes excuses its infringement. *Michaels v. Internet Entm't Group, Inc.*, 5 F. Supp. 2d 823, 831 (C.D. Cal. 1998). If Rimini identifies any relevant license provision, Oracle may overcome the defense of express license by showing that Rimini's conduct exceeded the scope of that provision. *LGS Architects, Inc. v. Concordia Homes*, 434 F.3d 1150, 1156 (9th Cir. 2006).

Construing the scope of a license is principally a matter of contract interpretation.[5] *S.O.S., Inc. v.*

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[5] By their express terms, the PeopleSoft and Siebel-branded software licenses at issue in this action are to be construed in accordance with the laws of the State of California. *See e.g.*, Doc. #242, Exhibit 10, City of Flint's Software Licensing Agreement, §15 ("This Agreement is made in and shall be

Payday, Inc., 886 F.2d 1081, 1088 (9th Cir. 1989). The starting point for the interpretation of any contract is the plain language of the contract. *Klamatch Water Users Protective Ass'n v. Patterson*, 20 F.3d 1206, 1210 (9th Cir. 1999) ("Whenever possible, the plain language of the contract should be considered first."). When a contract contains clear and unequivocal provisions, those provisions shall be construed to their usual and ordinary meaning. *Id.* Then, using the plain language of the contract, the court shall effectuate the intent of the parties. *Id.* at 1210 ("Contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself.").

However, if a contract term is ambiguous, the court may look beyond the plain language of the

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governed by the laws of the State of California."). The J.D. Edwards-branded software license at issue is to be construed in accordance with the laws of the State of Colorado. Doc. #242, Exhibit 16, Giant Cement's Software Licensing Agreement, Art. XI, §2 ("All disputes arising out of or related to this Agreement shall be determined under the laws of the State of Colorado.").

When construing licenses under California law, "the exception to the parol evidence rule is broad - extrinsic evidence is admissible to demonstrate that there is an ambiguity in an instrument and for the purpose of construing this ambiguity." *Adobe Sys., Inc. v. One Stop Micro, Inc.*, 84 F. Supp. 2d 1086, 1090 (N.D. Cal. 2000). A court may consider extrinsic evidence of industry customs, course of dealing, and course of performance. *Id.* Like California, Colorado also allows for consideration of extrinsic evidence to determine whether there is an ambiguity in the contract. *See Sola Salon Studios, LLC v. Heller*, Case No. 08-cv-1565-PAB-BNB, 2012 U.S. Dist. LEXIS 36247, *6 (D. Colo. 2012).

contract to determine the intent of the parties. *See e.g., Foad Consulting Group, Inc. v. Azzalino*, 270 F.3d 821, 828 (9th Cir. 2001) ("If a party's extrinsic evidence creates the possibility of an ambiguity, a court may not rely on the text of the contract alone to determine the intent of the parties."). A contract term is ambiguous if it is "reasonably susceptible to more than one interpretation." *Shelton v. Shelton*, 78 P.3d 507, 510 (Nev. 2003).

In this action, it is undisputed that Rimini does not have its own software license from Oracle for any of the identified Enterprise Software programs copied on its systems. Instead, Rimini contends that Oracle's software licensing agreements with the four customers at issue in this motion expressly authorize it to copy, keep, and maintain copies of the copyrighted software on its company systems and under its control in order to provide contracted software support services to those customers. *See* Doc. #259, p.8. As each customer's software licensing agreement is different, the court must evaluate Rimini's express license affirmative defenses separately for each customer at issue in this motion.

1. City of Flint

Oracle has identified five development environments on Rimini's systems associated with the City of Flint which contain copies of Oracle's copyrighted PeopleSoft-branded software. These development environments are identified on Rimini's systems as H751COFO #1, H751COFO #2, H751COF2, H751DEVO, and H751AUC.

In its motion, Oracle contends that Rimini cannot meet its burden of identifying a relevant software license excusing its infringement of Oracle's

copyrighted software. *See e.g., Michaels*, 5 F. Supp. 2d at 831 (holding that to establish the affirmative defense of express license, defendant must identify a license that authorized it to copy the protected work). Initially, Oracle argues that Rimini cannot assert the City of Flint's software licensing agreement[6] as a defense in this action because Rimini cannot prove that the City of Flint's software installation media (the installation disc provided by Oracle for the licensed software) was used to build the development environments associated with the City of Flint.[7] *See* Doc. #237, p.18-19.

Oracle's initial argument is premised on the flawed assumption that the rights to use and install

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[6] A full and complete copy of the City of Flint's Software License and Service Agreement is attached as Exhibit 10 to Oracle's Appendix of Exhibits Cited in Support of Oracle's Motion for Partial Summary Judgment. Doc. #242, Exhibit 10

[7] It is undisputed in this action that Rimini does not know which, if any, of its customer's software installation media was used to build the development environments associated with the City of Flint. In particular, Rimini admits that it does not know the exact source of the PeopleSoft-branded software that was used to build development environments H751DEVO, H751AUD, and H751COFO #1. Doc. #242, Exhibit 25, p.3. H751COFO #2 is a cloned copy of H751COFO #1, so its origins are also unknown. *Id.*

Further, although Rimini states that development environment H751COF2 was built directly from a customer's software installation media, Rimini admits that it cannot identify the customer whose installation media was used to build that environment. Doc. #242, Exhibit 24, p.30:22-23 ("Rimini does not have records from which it can identify all of the local PeopleSoft environments created from the stored installation media.").

the licensed software are restricted and tied solely to the specific software installation media delivered by Oracle, and is in direct contention with the express language of the City of Flint's license as well as federal copyright law. In the City of Flint's license, Oracle granted the City of Flint "a perpetual, non-exclusive, non-transferable license to use the licensed Software." Doc. #242, Exhibit 10, §1.1. "Software" is defined as "all or any portion of the then commercially available global version(s) of the binary computer software programs." *Id.* at §16. Nowhere does the licensing agreement require the City of Flint to install the licensed software from the specific installation media provided by Oracle.[8] Rather, the license grants the City of Flint the right to install and use "version(s)" of the licensed software.[9] This is separate from, and in contrast to, a right to install and use *only* the provided software installation media. Other provisions of the City of Flint's license are in accord; differentiating between the licensed software and the provided installation media. *See e.g.*, Doc. #242, Exhibit 10, § 4 (stating that Oracle "retains title to all portions of the Software," but "[t]itle to the physical media for the Software vests in [the City of Flint] upon delivery").

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[8] The court notes that although the easiest way to install the licensed software is through a customer's provided installation media, it is not the *only* way to install the licensed software. For example, the licensed software could be downloaded from Oracle to a customer's system.

[9] It is undisputed that the development environments associated with the City of Flint contain copies of the versions of the PeopleSoft-branded software licensed by the City of Flint.

Additionally, under federal law, software installation media is not protected under federal copyrights. This is because software copyrights are separate and distinct from the physical objects on which they may be embodied. *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1336 (9th Cir. 1984) ("The ownership of the copyright is separate and independent from ownership of the material object in which it is embodied."); *see also Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 449 (2007) (holding that copyrighted software "is an idea without physical embodiment"). Consistent with this authority, the court finds that the rights granted by the City of Flint's software licensing agreement are not limited or restricted to any specific physical embodiment of the software, like Oracle's provided software installation media.

Therefore, the court finds that the rights contained in the City of Flint's license apply equally to the copies of the copyrighted software maintained on Rimini's systems regardless of whether Rimini used the specific installation media provided by Oracle to make those copies. As such, Rimini's failure to prove that the City of Flint's software installation media was used to create the identified development environments is not determinative to Rimini's affirmative defense, and Rimini may assert the City of Flint's software license as a defense to Oracle's claim of copyright infringement.

As the court has found that Rimini may assert the City of Flint's license in this action, Rimini must now identify those license provisions, if any, that expressly authorize its copying of Oracle's copyrighted PeopleSoft-branded software. *Michaels*, 5 F. Supp. 2d at 831. In support of its affirmative

defense, Rimini identifies three license provisions: (1) Section 1.2(b) permitting copying of the software; (2) Section 1.2(c) permitting modification of the software; and (3) Section 14.2 permitting access to and use of the software to third parties that provide services to the City of Flint. *See* Doc. #259, p.10-12. Each provision is discussed below.

a. Section 1.2(b)

Section 1.2(b) of the City of Flint's license states in pertinent part that "[the City of Flint] may [] make a reasonable number of copies of the Software solely for: (i) use in accordance with the terms set forth herein . . .; (ii) archive or emergency back-up purposes; and/or (iii) disaster recovery testing purposes." Doc. #242, Exhibit 10, §1.2(b). Rimini contends that this provision expressly authorizes it to make "a reasonable number of copies" of the licensed software on its own systems and under its control in order to provide contracted software support services to the City of Flint. *See* Doc. #259, p.10.

The court has reviewed the documents and pleadings on file in this matter and finds that the plain, unambiguous language of Section 1.2(b) does not expressly authorize Rimini to make copies of the licensed software. First, the plain language of Section 1.2(b) provides that *only* the City of Flint may make copies of the software. *Id.* ("[the City of Flint] may [] make a reasonable number of copies . . ."). Nowhere does this provision authorize Rimini, as a third-party, to make a copy of the licensed software.

Second, Section 1.2(b) authorizes copying of the software only for three very limited bases: (1) a use

in accordance with the terms of the license; (2) archival and back-up purposes; and (3) disaster recovery testing purposes. *Id.* Upon review of Rimini's use of the development environments associated with the City of Flint, the court finds that none of the environments were created for archival, emergency back-up, and/or disaster recovery purposes. Rather, the undisputed evidence establishes that these development environments were used to develop and test software updates for the City of Flint and other Rimini customers with similar software licenses. *See* Doc. #242, Exhibit 50, Lester Depo., p.207:17-201:25; Exhibit 62, Williams Depo., p.9:22-10:6. Further, a development environment - which is a modifiable (or already modified) copy of the software used to develop and test software updates - is in complete contrast to an archival or backup copy of the software - which is inherently an unmodified copy of the software for use in the event that the production copy of the software (the copy used on a customer's systems) is corrupted or lost. Thus, the court finds that Rimini's use of the copyrighted PeopleSoft-branded software is outside the scope of Sections 1.2(b)(ii) and (iii).

Third, although Rimini argues extensively that its copying of Oracle's copyrighted software was a "use in accordance with the terms [of the license]" under Section 1.2(b)(i), the court finds that Rimini's copying of the copyrighted software on its company systems is also a use outside the scope of this provision. In its motion for summary judgment, Oracle asserts, and the court agrees, that Section 1.2(b)(i), which authorizes a reasonable number of copies for "use in accordance with the terms set forth herein" is subject to the licensing restrictions outlined in Section 1.1 of the City of Flint's license. A

"use in accordance with the terms set forth herein" necessarily means that use of the licensed software under this provision is subject to all other licensing restrictions identified in the same main section, in this case Section 1 of the City of Flint's license. *See e.g., Threlkeld v. Ranger Ins. Co.*, 202 Cal. Rptr. 529, 532 (Cal. App. 1984) (interpreting the phrase "in accordance with" a set of regulations as incorporating those regulations by reference).

Section 1.1 of the license grants the City of Flint a "license to use the licensed Software, solely for [the City of Flint's] *internal data processing operations at its facilities* in the [United States]." Doc. #242, Exhibit 10, § 1.1 (emphasis added). This license provision expressly limits use of the software (1) to the City of Flint's facilities and (2) for the City of Flint's internal data processing operations (i.e. normal use of the software). The court finds incorporating the restrictions of Section 1.1 into Section 1.2(b)(i)'s "use in accordance with" language, Section 1.2(b)(i) expressly limits copying the licensed software to *only* the City of Flint's facilities.[10] The court's interpretation of the license is appropriate as the law requires a contractual interpretation that gives effect to every provision of the license. *See Boghos v. Certain Underwriters at Lloyd's of London*, 115 P.3d 68, 72 (Cal. 2005) (holding that a court must "give effect to every part [of a contract], if reasonably practicable, each clause helping to interpret the other"). Moreover, the court's interpretation of the City of Flint's license is

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[10] Here, it is undisputed that Rimini's copies of the licensed PeopleSoft-branded software are kept on Rimini's systems at its facilities and outside the control of the City of Flint.

confirmed by Section 1.2(a) which authorizes a backup copy of the software outside the City of Flint's facilities. *See* Doc. #242, Exhibit 10, §1.2(a) ("[The City of Flint] may . . . in the event that a Server at its facility is inoperable, use the Software temporarily on a back-up server, which may be at a third-party site provided that the back-up Server is under the sole control of [the City of Flint] . . ."). Recognizing that Section 1.2(a) specifically authorizes a back-up copy of the licensed software at an off-site location, the court finds that Section 1.2(b)(i), which does not contain any similar off-site language, does not authorize Rimini's off-site copies of the licensed software.

Additionally, it is undisputed that the development environments associated with the City of Flint were not used solely for the City of Flint's internal data processing operations. Instead, the development environments were used to develop and test software updates for the City of Flint and other Rimini customers with similar software licenses. *See* Doc. #242, Exhibit 50, Lester Depo., p.207:17-201:25; Exhibit 62, Williams Depo., p.9:22-10:6. Therefore, the court finds that Rimini's copying of the copyrighted software is outside the scope of Section 1.2(b)(i). Accordingly, and consistent with the court's rulings above, the court finds that Section 1.2(b) does not expressly authorize Rimini's copying of Oracle's copyrighted PeopleSoft-branded software as a matter of law.

b. Section 1.2(c)

Rimini also asserts Section 1.2(c) of the City of Flint's license, in support of its affirmative defense. Section 1.2(c) states that "[the City of Flint] may [] modify or merge the Software with other software."

Doc. #242, Exhibit 10, §1.2(c). Rimini argues that because Section 1.2(c) allows for the City of Flint to modify the software, this provision necessarily authorizes Rimini to make a number of copies of the software to facilitate such modifications as a "use in accordance with the terms" of the license under Section 1.2(b)(i). *See* Doc. #259, p.10-11.

However, the court finds that the right to modify the software pursuant to Section 1.2(c) does not authorize Rimini to make copies of the software. First, the court notes, once again, that the right to modify the software is granted solely to the City of Flint, and not to any third-party. *Id.* ("[the City of Flint] may [] modify . . . the software . . ."). Second, the right to modify the software is a separate and distinct right from the right to reproduce the software. *See SQL Solutions v. Oracle Corp.*, Case no. C-91-1079 MHP, 1991 U.S. Dist. LEXIS 21097, *13 (N.D. Cal. 1991) (citing *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1088 n.8 (9th Cir. 1989)) (distinguishing the right to modification of copyrighted software as legally distinct from the rights to possess, use, or reproduce the software). Thus, a grant of the right to modify the software does not automatically grant a right to reproduce that software. *See e.g., Stewart v. Abend*, 495 U.S. 207, 222-24 (1990) (holding that a licensed derivative work could not be reproduced or distributed absent rights to reproduce and distribute the portions of the pre-existing work that were incorporated into the derivative work). Moreover, the word "copy" is conspicuously absent from Section 1.2(c).

Finally, as addressed above, a copy of the software under Section 1.2(b)(i) is subject to the facilities restrictions of Section 1.1. *See supra*,

§III(B)(1)(a). Thus, Rimini is still not authorized to have a copy of the licensed software on its own systems. Therefore, the court finds that the plain, unambiguous language of Section 1.2(c) does not authorize Rimini to make copies of the licensed PeopleSoft-branded software as a matter of law.

c. Section 14.2

The last provision Rimini asserts in support of its express license affirmative defense is Section 14.2 of the City of Flint's license. Section 14.2 states in pertinent part that: "[the City of Flint] may provide access to and use of the Software *only* to those third parties that: (i) provide services to [the City of Flint] concerning [the City of Flint's] use of the Software; (ii) have a need to use and access the Software; and (iii) have agreed to substantially similar non-disclosure obligations . . . as those contained herein." Doc. #242, Exhibit 10, §14.2 (emphasis added).

Rimini argues that Section 14.2 expressly authorizes third-party software support service providers, like itself, to make copies of the licensed software on its systems in order to carry out contracted support services with the City of Flint. *See* Doc. #259, p.11-12. The court disagrees.

First, the plain, unambiguous language of Section 14.2 only allows for the City of Flint to provide "access to and use of the Software." Doc. #242, Exhibit 10, §14.2. The right to access and use the licensed software is separate from a right to reproduce or copy the software, and there is no evidence before the court that Rimini, as a third party service provider, cannot perform its contracted services without having its own copy of the software on its own systems. Further, unlike other license

provisions, the word "copy" is not found anywhere in Section 14.2. Therefore, the court finds that the plain language of Section 14.2 does not authorize copying of the licensed software.

Second, even if Section 14.2 authorized copying of the licensed software, Rimini has failed to satisfy the third condition for having "access to and use of" the software under Section 14.2. Specifically, Rimini has proffered no admissible evidence that it has agreed to certain nondisclosure obligations as required by Section 14.2.[11] Thus, Rimini's copies of the software are outside the scope of this provision because Rimini has not "agreed to substantially similar nondisclosure obligations." *See* Doc. #242, Exhibit 10, §14.2(iii). Therefore, the court finds that Section 14.2 does not expressly authorize Rimini's copying of Oracle's copyrighted PeopleSoft branded software in this action.

d. Conclusion

Based on the court's rulings above, none of Rimini's asserted license provisions (Sections 1.2(b),

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[11] The court notes that, as part of its opposition to Oracle's motion for summary judgment, Rimini did submit an alleged copy of an agreement between itself and the City of Flint which allegedly contained similar non-disclosure language. See Doc. #261, Exhibit 9. However, Oracle filed a motion to strike the document as unsigned and unauthenticated (Doc. #283), which was granted by the court (Doc. #471). In that order, the court found that the evidence was not admissible because the document did not constitute an original writing under Rule 1002 of the Federal Rules of Evidence. See Doc. #471, p.5. Thus, there is currently no evidence before the court that Rimini agreed to similar non-disclosure obligations as those outlined in the City of Flint's license.

1.2(c), or 14.2) expressly authorize Rimini's copying of Oracle's copyrighted PeopleSoft-branded software as a matter of law. Therefore, the court finds that Oracle is entitled to summary judgment on Rimini's express license affirmative defense as it relates to the City of Flint, and the court shall grant Oracle's motion accordingly.

2. Pittsburgh Public Schools

Oracle has identified four development environments on Rimini's systems associated with the Pittsburgh Public Schools which contain copies of Oracle's copyrighted PeopleSoft-branded software. These development environments are identified on Rimini's systems as H831PPSM, H831PPS2, F842PPSM #1, and F842PPSM #2.

As with the City of Flint, Oracle initially argues that Rimini cannot assert the Pittsburgh Public Schools' license[12] as a defense in this action because Rimini did not use the Pittsburgh Public Schools' provided software installation media to build the identified development environments.[13] However, as

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[12] A full and complete copy of the Pittsburgh Public Schools' Software License and Service Agreement is attached as Exhibit 11 to Oracle's Appendix of Exhibits Cited in Support of Oracle's Motion for Partial Summary Judgment. Doc. #242, Exhibit 11.

[13] The undisputed evidence in this action establishes that the four development environments associated with the Pittsburgh Public Schools were part of a chain of cloning that leads back to a development environment built with the City of Des Moines, Iowa's ("City of Des Moines") software installation media. In particular, Rimini admits that the original build source for development environment H831PPSM was development environment H831CODM associated with the City of Des Moines and built from the City of Des Moines's software

addressed with the City of Flint, Rimini's failure to use the Pittsburgh Public Schools' provided software installation media does not in and of itself preclude Rimini from asserting the Pittsburgh Public Schools' license in this action. *See supra*, §III(B)(1). Rather, the issue is whether the rights granted by the license are restricted and tied solely to the specific software installation media provided by Oracle.

Here, the court finds that the Pittsburgh Public Schools' license contains language similar to the City of Flint's license. For example, Oracle granted the Pittsburgh Public Schools "a nonexclusive, nontransferable license to make and run copies of the Software." Doc. #242, Exhibit 11, §1.1. Software under the license is defined as "all or any portion of the applicable Version for the Territory of the binary computer software and related source code." *Id* at §15. As with the City of Flint, nowhere does this license require the Pittsburgh Public Schools to install the licensed software from the specific

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installation media. Doc. #242, Exhibit 25, p.3,8. Development environment H831PPS2 was built from H831PPSM, so its origins are also the City of Des Moines's software installation media. *Id.* at p.8.

Similarly, Rimini admits that the build source for development environment F842PPSM #1 was development environment F842CODM associated with the City of Des Moines and built from the City of Des Moines's software installation media. *Id.* F842PPSM #2 is a clone of F842PPSM #1 so its origins are also the City of Des Moines's installation media. *Id.* at p.8. Thus, all of the software development environments associated with the Pittsburgh Public Schools were built, at least in part, from the City of Des Moines's software installation media, and not from the Pittsburgh Public Schools' software installation media.

installation media provided by Oracle. Rather, the license grants the Pittsburgh Public Schools the right to install and use "the applicable Version" of the licensed software.[14] Therefore, as with the City of Flint, the court finds that Rimini may assert the Pittsburgh Public Schools' license as a defense to Oracle's claim of copy-right infringement.

In support of its affirmative defense, Rimini identifies three license provisions that it argues expressly authorize copying of Oracle's copyrighted PeopleSoft-branded software: (1) Section 1.1 permitting copying of the software; (2) Section 1.2 permitting modification of the software; and (3) Section 10.2 permitting access to and use of the software to third parties that provide services to the Pittsburgh Public Schools.[15] *See* Doc. #259, p.18-20. Each provision is discussed below.

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[14] It is undisputed that the development environments associated with the Pittsburgh Public Schools contain copies of the same versions of the PeopleSoft-branded software licensed by the Pittsburgh Public Schools.

[15] Along with the Pittsburgh Public Schools' license, Rimini also asserts the City of Des Moines's license as a defense to Oracle's claim of copyright infringement. A copy of the City of Des Moines's Software License and Service Agreement is attached as Exhibit 12 to Oracle's Appendix of Exhibits Cited in Support of Oracle's Motion for Partial Summary Judgment. Doc. #242, Exhibit 12.

The court notes that the City of Des Moines's license mirrors the City of Flint's license (except for the identification of the parties), and Rimini has asserted the same license provisions (Sections 1.2(b), 1.2(c), and 14.2) to support its affirmative defense. *See* Doc. #242, Exhibit 12, §§ 1.2(b), 1.2(c), 14.2. As such, the court's rulings regarding the City of Flint's license apply with equal effect to the City of Des Moines's

a. Section 1.1

In Section 1.1 of the Pittsburgh Public Schools' license, Oracle granted "[the Pittsburgh Public Schools] a nonexclusive, nontransferable license to make and run copies of the Software . . . for access by Employees and Designates on one or more servers and/or workstations located at facilities owned or leased by [the Pittsburgh Public Schools] . . ." Doc. #242, Exhibit 11, §1.1. Rimini contends that Section 1.1 expressly authorizes it to make copies of the licensed software on its systems and under its control in order to provide contracted software support services to the Pittsburgh Public Schools. *See* Doc. #259, p.18. The court disagrees.

First, the plain, unambiguous language of Section 1.1 expressly provides that *only* the Pittsburgh Public Schools may make copies of the software. *See* Doc. #242, Exhibit 11, §1.1 (granting the Pittsburgh Public Schools the right "to make or run copies of Software . . ."). Nowhere does this license provision authorize Rimini, or any other third-party, to make copies of the licensed software.

Second, Section 1.1 of the Pittsburgh Public School's license limits both the copying and use of the licensed software to "facilities owned or leased by [the Pittsburgh Public Schools]." Doc. #242, Exhibit 11, §1.1. Here, it is undisputed that Rimini made copies of the licensed software at its own facilities

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license. Therefore, the court finds that the City of Des Moines's software licensing agreement does not expressly authorize Rimini's copying of Oracle's copyrighted PeopleSoft and PeopleTools software as a matter of law. *See supra*, §III(B)(1)(a)-(d).

and outside the control of the Pittsburgh Public Schools. As such, Rimini's copying of the licensed software on its own systems is outside the scope of Section 1.1.

Finally, Section 1.1 further precludes the right of third-parties to copy the software. Specifically, Section 1.1 contains the term "Designate." *See* Doc. #242, Exhibit 11, §1.1. "Designate" is defined as "[the Pittsburgh Public Schools'] customers, suppliers, vendors, benefits providers and other such external parties providing goods or services to [the Pittsburgh Public Schools] that [the Pittsburgh Public Schools] may provide with a right to access the Software consistent with the terms of this Agreement." *See* Doc. #242, Exhibit 11, §15. However, the Pittsburgh Public Schools' license limits the rights that can be granted to Designates,[16] including limitations that "[i]n no event shall a Designate have the right to (i) *install* the Software on a server, workstation or other computer, (ii) *access the source code for the Software*; or (iii) undertake any of the actions listed in Section 2" (which includes copying the software). *Id.* (emphasis added). Thus, reading the limitations defined under "Designate" into the license, Section 1.1 provides that "[i]n no event" shall a Designate, like Rimini, have a right to install or copy the licensed software on its own systems. Therefore, the court finds that Section 1.1 does not authorize Rimini's copying of Oracle's copyrighted software as a matter of law.

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[16] Both parties agree that Rimini constitutes a "Designate" under the license.

b. Section 1.2

In support of its affirmative defense, Rimini also asserts Section 1.2 of the Pittsburgh Public Schools' license. Under Section 1.2, Oracle granted the Pittsburgh Public Schools "a nonexclusive, nontransferable license to modify the Software . . ." Doc. #242, Exhibit 11, §1.2.

Rimini argues that because Section 1.2 allows the Pittsburgh Public Schools to modify the software, this provision necessarily authorizes Rimini to make copies of the software to facilitate such modifications. *See* Doc. #259, p.18. However, as addressed at length with the City of Flint, the right to modify the software does not expressly authorize Rimini to make copies of the software on its own systems. *See supra*, §III(B)(1)(b) (citing *SQL Solutions*, 1991 U.S. Dist. LEXIS 21097; *Stewart*, 495 U.S. 207). Further, the word "copy" is absent from this provision. Therefore, consistent with the court's previous ruling, the court finds that the plain, unambiguous language of Section 1.2 does not authorize Rimini to make copies of the licensed software as a matter of law.

c. Section 10.2

The last provision Rimini asserts in support of its express license affirmative defense is Section 10.2 of the Pittsburgh Public Schools' license. Section 10.2 states in pertinent part that: "[the Pittsburgh Public Schools] may provide access to and use of the [software] *only* to those third parties that: (a) provide services to [the Pittsburgh Public Schools] concerning [the Pittsburgh Public Schools'] use of the Software . . .; (b) have a need to use and access the Software . . .; and (c) have agreed to substantially

similar non-disclosure obligations as those contained herein." Doc. #242, Exhibit 11, §10.2 (emphasis added).

Rimini argues that Section 10.2 expressly authorizes third-party software support service providers, like itself, to make copies of the licensed software in order to carry out contracted support services with the Pittsburgh Public Schools. *See* Doc. #259, p.19. The court disagrees.

First, the plain, unambiguous language of Section 10.2 allows for the Pittsburgh Public Schools to provide "access to and use of the Software." *See* Doc. #242, Exhibit 11, §10.2. As addressed above with the City of Flint, the right to access and use the licensed software is a separate right from the right to copy or reproduce the software. *See supra*, §III(B)(1)(c). Further, unlike other license provisions, the word "copy" is not found anywhere in Section 10.2. Therefore, the court finds that the Section 10.2 does not permit or authorize copying of the licensed software.

Second, Rimini has failed to satisfy the third condition for having "access to and use of" the software under Section 10.2. Specifically, Rimini has proffered no admissible evidence that it has "agreed to substantially similar non-disclosure obligations" as required by Section 10.2.[17] *See* Doc. #242, Exhibit

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[17] Similar to the City of Flint, the court notes that as part of its opposition to Oracle's motion for summary judgment, Rimini did submit an alleged copy of an agreement between itself and the Pittsburgh Public Schools. *See* Doc. #261, Exhibit 30. However, Oracle filed a motion to strike the document as unsigned and unauthenticated (Doc. #283) which was granted by the court (Doc. #471). In the court's order, the court found

11, §10.2(iii). Thus, even if Section 10.2 authorized copying of the licensed software, Rimini's copies are outside the scope of this provision. Therefore, the court finds that Section 10.2 does not expressly authorize Rimini's copying of Oracle's copyrighted software.

d. Conclusion

Based on the rulings above, the court finds that none of Rimini's asserted license provisions (Sections 1.1, 1.2, or 10.2) expressly authorize Rimini's copying of Oracle's copyrighted PeopleSoft-branded software as a matter of law. Therefore, the court finds that Oracle is entitled to summary judgment on Rimini's express license affirmative defense as it relates to the Pittsburgh Public Schools, and the court shall grant Oracle's motion accordingly.

3. Giant Cement

In its motion for summary judgment, Oracle identifies only a single development environment on Rimini's systems associated with Giant Cement, development environment JGEHE5TSA1, which contains a copy of Oracle's copyrighted J.D. Edwards-branded software.

In support of its affirmative defense, Rimini asserts Giant Cement's software licensing

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that the evidence was not admissible because the document did not constitute an original writing under Rule 1002 of the Federal Rules of Evidence. *See* Doc. #471, p.5. Thus, there is currently no evidence before the court that Rimini agreed to similar non-disclosure obligations as those outlined in the Pittsburgh Public Schools' license.

agreement[18] as a defense to Oracle's claim of copyright infringement relating to the development environment associated with Giant Cement and specifically identifies Article II, Section 7(iii) as the provision that expressly authorizes its copying of Oracle's copyrighted software. *See* Doc. #259, p. 21-22.

Article II, Section 7 of Giant Cement's license provides that "[Giant Cement] shall not, or cause anyone else to: (iii) copy the Documentation or Software except to the extent necessary for [Giant Cement's] archival needs and to support the Users." Doc. #242, Exhibit 16, Article 2 - License Restrictions, §7(iii). Rimini argues that the plain language of this provision expressly authorizes Rimini to make a copy of the licensed software on its own systems to support Giant Cement's archival needs. *See* Doc. #259, p.22.

In opposition, Oracle argues that regardless of Section 7(iii)'s express language authorizing third-party copies of the licensed software for archival purposes, Giant Cement's license does not allow Rimini to copy the software on its own systems

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[18] In contrast to the two previously addressed customers - the City of Flint and the Pittsburgh Public Schools - Rimini has established that the development environment associated with Giant Cement was built directly from Giant Cement's provided software installation media. *See* Doc. #242, Exhibit 16. As such, the parties agree that Rimini may assert Giant Cement's license as a defense in this action.

A full and complete copy of Giant Cement's Software License and Service Agreement is attached as Exhibit 16 to Oracle's Appendix of Exhibits Cited in Support of Oracle's Motion for Partial Summary Judgment. Doc. #242, Exhibit 16.

because Giant Cement's license restricts third parties to only "screen access" of the software and does not grant them permission to copy or have access to the software's source code. *See* Doc. #237, p.24-25. Article II - under the heading License Restrictions - identifies who may access the software. Under Article II, access to the software is limited to (1) Giant Cement's employees; (2) independent contractors engaged by Giant Cement who require access to the software to perform their tasks; and (3) distributors, vendors, and customers of Giant Cement. Doc. #242, Exhibit 15, Article II - License Restrictions, §1. Further, under Article II, the scope of access for non-employees is limited solely to screen access. Doc. #242, Exhibit 16, Article II - License Restrictions, §3 ("For any access to the software other than by an employee of customer, customer shall not provide access to source code and all provided access shall be restricted to screen access for the functions required."). Thus, Oracle argues that Article II does not authorize Rimini to install a copy of the J.D. Edwards-branded software on its systems, because a copy of the software necessarily includes access to the software's source code.

The court has reviewed the documents and pleadings on file in this matter and finds that there are disputed issues of material fact which preclude summary judgment on this issue. Although the court agrees that Article II does not permit Rimini to access the software's source code to carry out development and testing of software updates, the court finds that having a copy of the software on Rimini's systems for archival purposes does not violate this license restriction so long as Rimini does not access the software's source code. In its motion for summary judgment, Oracle has failed to proffer

any evidence that Rimini accessed the software's source code while providing archival support to Giant Cement. In contrast, Rimini has proffered evidence that the development environment associated with Giant Cement is used solely for archival purposes as authorized by Section 7(iii). *See* Doc. #261, Exhibit 6, Grigsby Depo., p. 13:7-15 (stating that Rimini had not used Giant Cement's development environment for any software update development or testing); p. 28:15-29:1 ("Q. Okay. Going back to my question. Were any of the [J.D. Edwards software] environments at [Rimini] ever used for any purpose, research, fix delivery, et cetera? A. Again, from my research in talking to everyone that I could in my team and people there that could represent what was done prior to me coming on board, no, those local environments were not used. All access to those customers who are still with us is done on their in-house machine."). Based on this record, the court finds that there are disputed issues of material fact as to whether Rimini's use of the development environment associated with Giant Cement was for archival purposes or whether Rimini accessed the software's source code. Accordingly, the court shall deny Oracle's motion for summary judgment on Rimini's express license affirmative defense as it relates to Giant Cement.

4. Novell

The final customer at issue in Oracle's motion for summary judgment is Novell. Oracle has identified two development environments on Rimini's systems associated with Novell which contain copies of Oracle's copyrighted Siebel-branded software. These development environments are identified on Rimini's systems as NOVELL-AP01 and NOVELL-CLI.

In support of its affirmative defense, Rimini asserts Novell's software licensing agreement[19] as a defense to Oracle's claim of copyright infringement for the development environments associated with Novell and specifically identifies two license provisions it argues expressly excuses its infringement: (1) Section 2.1(iv); and (2) Section 2.1(viii). *See* Doc. #259, p.24-25.

Under Section 2.1(iv), Oracle granted Novell the right "[t]o reproduce, exactly as provided by [Oracle], a reasonable number of copies of the [software] solely for archive or emergency backup purposes or disaster recovery and related testing . . ." Doc. #242, Exhibit 17, §2.1(iv). Under Section 2.1(viii) Oracle granted Novell the right "[t]o have third parties install, integrate, and otherwise implement the [software]." Doc. #242, Exhibit 17, §2.1(viii).

Rimini argues that reading these two provisions together, Novell's license allows a third-party to install a copy of the software on its own systems for archival or emergency back-up purposes. *See* Doc. #259, p.25.

In opposition, Oracle argues that Novell's license does not authorize Rimini to have an installed copy

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[19] Rimini has established that both development environments associated with Novell were built from Novell's provided software installation media. *See* Doc. #242, Exhibit 27, p.3. As with Giant Cement, the parties do not dispute that Rimini may assert Novell's license as a defense in this action.

A full and complete copy of Novell's Software License and Service Agreement is attached as Exhibit 17 to Oracle's Appendix of Exhibits Cited in Support of Oracle's Motion for Partial Summary Judgment. Doc. #242, Exhibit 17.

of the licensed software on its systems for any purpose. *See* Doc. #237, p.25-26. In particular, Oracle argues that Section 2.1(i) of Novell's license grants Novell the right "to use the programs on the designated systems or on a backup system if the designated system is inoperative." Doc. #242, Exhibit 17, §2.1(i). "Designated Systems" is defined as a "customer's user and server system(s) designated in the order form(s)." Doc. #242, Exhibit 17, §1.5. The user system in turn, is defined as "the computer hardware and operating systems operated by users in the course of their employment with [Novell], including notebook and portable computers." Doc. #242, Exhibit 17, §1.21. Finally, the server system is defined as "the server hardware and operating system(s) of [Novell] designated on the Order form(s)." Doc. #242, Exhibit 17, §1.15. Reading all of these definitions together, Oracle argues that Section 2.1(i) limits the use of the program to only Novell's systems. Therefore, Oracle argues that Novell's license does not authorize Rimini to have any copies of the licensed software on its own systems. The court disagrees.

First, the court finds that the plain language of Section 2.1(iv) authorizes Novell to make archival, emergency backup, or disaster-recovery testing copies. Further, the court finds that the plain language of Section 2.1(viii) permits Novell to allow Rimini, or another third-party, to install the software for archival, emergency back-up, or disaster recovery purposes. When read in conjunction, Sections 2.1(iv) and (viii) authorize Novell to allow Rimini to make a reasonable number of copies of the licensed Siebel software on Rimini's system for archival and back-up

purposes.[20] Second, Oracle's argument concerning Section 2.1(i), refers only to Novell's use of the licensed software and not to any other rights granted under the license. Therefore the court finds that Novell's license allows for archival and/or back-up copies of the software on a third-party system. Accordingly, the court shall deny Oracle's motion for summary judgment on Rimini's express license affirmative defense as it relates to Novell.

C. Implied License and Consent (Third and Sixth Affirmative Defenses)

In the present motion, Oracle also moves for summary judgment on Rimini's third affirmative defense for consent of use and sixth affirmative defense for implied license. *See* Doc. #237. Iimplied license and consent of use are legally duplicative affirmative defenses and shall be addressed together. *See e.g., Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1308-09 (11th Cir. 2008) (equating a consent defense to that of implied license and applying the same standard); *I.A.E., Inc. v. Shaver*, 74 F.3d 768, 775-76 (7th Cir. 1996) (holding that consent is equivalent to nonexclusive license defense).

"An implied license can be found where the copyright holder engages in conduct 'from which [the] other [party] may properly infer that the owner

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[20] Rimini has proffered evidence that the development environments associated with Novell are used exclusively for archival and back-up purposes, and related testing, as directly contemplated by Section 2.1(iv). *See* Doc. #261, Exhibit 11, Slepko Depo. 2010, p.62:5-15 (noting that Siebel environments are not used for development).

consents to his use." *Field v. Google, Inc.*, 412 F. Supp. 2d 1106, 1116 (D. Nev. 2006). "Consent to use the copyrighted work need not be manifested verbally and may be inferred based on silence where the copyright holder knows of the use and encourages it." *Id.*

In its affirmative defense, Rimini argues that for years Oracle shipped back-up copies of its customer's software installation media to Rimini's facilities with full knowledge that the installation media were not only being shipped to Rimini's facilities, but that Rimini was using the installation media to create copies of the software on its own systems to provide support services to Oracle's customers. *See* Doc. #259, p.26-29.

The court has reviewed the documents and pleadings on file in this matter and finds that the evidence before the court does not support Rimini's affirmative defenses of implied license and consent of use. The undisputed evidence in this action establishes that between 2007 and 2009, Oracle shipped at least 90 back-up copies of licensed software installation media to Rimini's facilities for different Oracle customers. Doc. #261, Exhibit 15, p.8-9 (recognizing that Oracle shipped software installation media to Rimini for approximately 90 customers from 2007 to 2009). Further, at the time it shipped the installation media, Oracle had been tracking Rimini's business activities. *See* Doc. #261, Exhibit 20 (E-mail to Oracle executives regarding Rimini dated May 1, 2006); Exhibit 21 (E-mail to Oracle executive concerning Rimini dated April 24, 2006); Exhibit 23 (E-mails reflecting Oracle's Vice President of Competitive Intelligence's tracking of Rimini dated March 2007).

Based on this limited evidence, Rimini argues that Oracle not only knew that Rimini was providing software support services to Oracle customers, but, by extension, also knew that Rimini was using the back-up copies of the software installation media to create copies of the software on Rimini's systems to service those customers. As such, Rimini argues that Oracle necessarily consented to Rimini's use of the software as it continued to ship Rimini back-up copies of the licensed software, and thus, there can be no copyright infringement. However, Rimini's assumption of Oracle's knowledge that the back-up copies of the installation media were being used to make copies of the licensed software on Rimini's systems is not supported by the evidence.

First, other evidence before the court establishes that these back-up copies, although ultimately shipped to Rimini, were shipped after Oracle's customers submitted requests to Oracle describing Rimini's address as the customers' "secondary offsite backup location."[21] *See* Doc. #242, Exhibit 33, Rimini's Second Amended Responses to Oracle's Third Set of Requests for Admission, Request #26 ("[A]dmit that more than 50% of the requests asked Oracle to ship the software to an 'offsite backup location.'" "Admitted"); Request #28 ("Admit that, at least 25 times, You instructed a [Rimini] customer or prospective [Rimini] customer to state that software was to be shipped to an "offsite backup location"

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[21] An offsite backup location is one where the software installation media can be held in safety, so that the installation media could be easily retrieved and provided to the customer in the event that the customer's copy of the installation media was lost or destroyed.

when that customer or prospective customer requested that Oracle ship software to a [Rimini] address." "Admitted.").

Second, Rimini admits that the purpose behind the obfuscated shipping requests was to allow Rimini to create development environments to service Rimini's customers without Oracle's knowledge. *See* Doc. #242, Exhibit 31, Corpuz Depo., p.160 ("Q. It's true, isn't it, that the reason for the request was for [Rimini] to build an environment on [Rimini's] premises for tax development work? A. I believe so, yes."). Thus, the evidence does not support Rimini's argument that Oracle knew that it was shipping back-up copies of the software installation media to Rimini's facilities.

Additionally, there is no evidence that Oracle knew of Rimini's use of the shipped installation media to create copies of the software on Rimini's systems. Rimini admits that the shipping requests were designed so that Oracle would not know that Rimini was using these backup copies of the licensed software. *See* Doc. #242, Exhibit 33, Rimini's Second Amended Responses to Oracle's Third Set of Requests for Admission, Request #30 ("Rimini responds that, having investigated, it is not aware of any requests to Oracle for shipment of Oracle Enterprise Software to a [Rimini] address which expressly stated that the software shipped to a [Rimini] address would be used by [Rimini] to install software on [Rimini's] computers."). Further, there is no evidence that Oracle consented to or encouraged Rimini to use the shipped installation media to make copies of the software on Rimini's systems. In fact, Rimini fails to present any evidence that Oracle knew that Rimini was copying the software onto

Rimini's systems during the relevant time period. Based on the evidence before the court, the court finds that no reasonable jury could conclude from Oracle's shipments of the installation media to a location described as a "secondary offsite backup location" that Oracle then authorized Rimini to copy that software onto Rimini's systems. Therefore, the court finds that the evidence in this action does not support Rimini's claims for an implied license or consent of use. *See Field*, 412 F. Supp. 2d at 1116 (stating that the copyright holder must both know of the infringing use and encourage that use for the court to find an implied license). Accordingly, the court shall grant Oracle's motion for summary judgment as to these affirmative defenses.

D. Conclusion

In conclusion, the court finds, consistent with the rulings above, that Oracle has established a prima facie case of copyright infringement as it relates to the four customers at issue in this action: the City of Flint, the Pittsburgh Public Schools, Giant Cement, and Novell. *See supra*, §III(A). Further, the court finds that, Oracle is entitled to summary judgment on Rimini's second affirmative defense of express license as it relates to the City of Flint and the Pittsburgh Public Schools. *See supra*, §§III(B)(1) and (2). However, Oracle is not entitled to summary judgment on Rimini's second affirmative defense of express license as it relates to Giant Cement and Novell. *See supra*, §§III(B)(3) and (4). Finally, the court finds that Oracle is entitled to summary judgment on Rimini's third affirmative defense for consent of use and sixth affirmative defense for implied license. *See supra*, §III(C). Accordingly, the court shall grant in-part and deny in-part Oracle's

present motion for partial summary judgment in accordance with these findings.

IV. Oracle's Motion for a Case Management Conference (Doc. #473)

Also before the court is Oracle's motion for a case management conference to discuss setting a trial schedule, Doc. #473, filed on January 10, 2014. The court has reviewed the motion and finds that a case management conference to set a trial schedule would not be productive as there is still a second motion for summary judgment pending before the court. *See* Doc. #405. This is a complex case with briefing upon summary judgment motions of approximately 200 pages, with over 2,700 pages of exhibits, before a heavily burdened court in which three of the total of seven active judgeships in this district have been vacant and unfilled during much of the pendency of these motions for summary judgment. Following decision upon the remaining motion for summary judgment, the parties will be required to submit a proposed joint pre-trial order in accordance with Local Rules 16-3 and 16-4. The proposed order will require that the parties submit a list of three agreed upon trial dates. If they are unable to agree upon proposed trial dates, or desire a case management conference to set a trial or motion schedule following the submission and acceptance of the proposed joint pre-trial order, the court will schedule such a conference at that time.

IT IS THEREFORE ORDERED that plaintiffs' motion for partial summary judgment (Doc. #237) is GRANTED in-part and DENIED in-part in accordance with this order.

IT IS FURTHER ORDERED that the clerk of court shall enter judgment in favor of plaintiffs Oracle USA, Inc.; Oracle America, Inc.; and Oracle International Corporation, and against defendant Rimini Street, Inc. on plaintiffs' first cause of action for copyright infringement as it relates to the identified development environments associated with the City of Flint and the Pittsburgh Public Schools.

IT IS FURTHER ORDERED that the clerk of court shall enter judgment in favor of plaintiffs Oracle USA, Inc.; Oracle America, Inc.; and Oracle International Corporation, and against defendant Rimini Street, Inc. on defendant's second affirmative defense for express license as it relates to plaintiffs' claim for copyright infringement relating to the City of Flint and the Pittsburgh Public Schools.

IT IS FURTHER ORDERED that the clerk of court shall enter judgment in favor of plaintiffs Oracle USA, Inc.; Oracle America, Inc.; and Oracle International Corporation, and against defendant Rimini Street, Inc. on defendant's third affirmative defense for consent of use and sixth affirmative defense for implied license.

IT IS FURTHER ORDERED that plaintiffs' unopposed motion for a case management conference (Doc. #473) is DENIED.

IT IS SO ORDERED.

DATED this 13th day of February, 2014.

s/ Larry R. Hicks
LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ORACLE USA, INC.; *et al.*, Plaintiffs, v. RIMINI STREET, INC., a Nevada corporation; SETH RAVIN, an individual, Defendants.	2:10-CV-00106-LRH-PAL ORDER

Before the court is plaintiffs Oracle USA, Inc.; Oracle America, Inc.; and Oracle International Corporation's (collectively "Oracle") second motion for partial summary judgment addressing their first cause of action for copyright infringement; defendant Rimini Street, Inc.'s ("Rimini") second, eighth, and ninth affirmative defenses; and Rimini's first and third counterclaims. Doc. #405.[1] Defendant Rimini filed an opposition to the motion (Doc. #436), to 1 which Oracle replied (Doc. #450).

I. Facts and Procedural History

Oracle develops, manufacturers, and licenses computer software, including Enterprise Software platforms.[2] Oracle is the current owner and/or

[1] Refers to the court's docket entry number.

[2] Enterprise Software is a type of computer software program that enables core operational tasks – like payroll,

exclusive licensee for various PeopleSoft, J.D. Edwards, and Siebel-branded Enterprise Software products. Oracle's Enterprise Software platforms have both an installed database component and an installed application component. The database component provides a foundation for the application software which then uses, stores, and retrieves data in the database for use across an entire organization. Oracle's Enterprise Software application programs - including its PeopleSoft, J.D. Edwards, and Siebel-branded products - are run on Oracle's Relational Database Management Software ("Oracle Database") as the database component for the programs.

Rather than sell Oracle Database outright, Oracle licenses the use of the database software to customers through software licensing agreements - known as Oracle License and Service Agreements ("OLSAs") - and to other software developers through a Developer License. Oracle also provides support services to its customers through separate software support service contracts.

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human resource tasking, and inventory management - across an entire organization. Instead of being tied to a specific computer, Enterprise Software is hosted on a server and provides simultaneous access and service to a large number of users over a computer network. These features and functions are in contrast to typical computer software, which is generally a single-user application executed on a user's personal computer.

A key feature of Enterprise Software is the ability to modify and customize the software for an entity's specific needs and to support the software through periodic software and regulatory updates to maintain the software's continuing functionality.

Defendant Rimini is a company that provides similar software support services to customers licensing Oracle's Enterprise Software programs and competes directly with Oracle to provide these services.

On January 25, 2010, Oracle filed a complaint alleging that Rimini copied several of Oracle's copyright-protected software programs onto its own computer systems in order to provide software support services to its customers. In its complaint, Oracle alleged thirteen causes of action against Rimini: (1) copyright infringement; (2) violation of the Federal Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. §§ 1030(a)(2)(C), (a)(4), & (a)(5); (3) violation of the California Computer Data Access and Fraud Act ("CDAFA"), Cal. Penal Code § 502; (4) violation of Nevada Revised Statutes ("NRS") § 205.4765; (5) breach of contract; (6) inducement of breach of contract; (7) intentional interference with prospective economic advantage; (8) negligent interference with prospective economic advantage; (9) unfair competition; (10) trespass to chattels; (11) unjust enrichment; (12) unfair practices; and (13) accounting. Doc. #1.

On March 29, 2010, Rimini filed an answer contesting Oracle's claims and alleging three counterclaims: (1) defamation, business disparagement, and trade libel; (2) copyright misuse; and (3) unfair competition in violation of California Business and Professional Code, Cal. BPC. § 17200. Doc. #30. Rimini also raised eleven affirmative defenses to Oracle's claims: (1) invalid copyrights; (2) express license; (3) consent of use; (4) copyright misuse; (5) improper registration; (6) implied license; (7) merger; (8) statute of limitations; (9) laches; (10)

fair use; and (11) limitations on exclusive rights of computer programs under 17 U.S.C. § 117. *Id.*

In April 2010, Oracle filed an amended complaint (Doc. #36) to which Rimini filed an amended answer (Doc. #46) and a motion to dismiss (Doc. #48). On August 13, 2010, the court granted in-part and denied in-part Rimini's motion, dismissing Oracle's eighth cause of action for negligent interference with prospective economic advantage. Doc. #78.

In response to Rimini's amended answer, Oracle filed a motion to dismiss Rimini's counterclaims and affirmative defenses. Doc. #67. On October 29, 2010, the court granted in-part and denied in-part Oracle's motion, dismissing several defamation allegations from Rimini's first counterclaim for defamation, and dismissing the entirety of Rimini's second counterclaim and fourth affirmative defense for copyright misuse. Doc. #111.

In June 2011, Oracle filed a second amended complaint. Doc. #146. In response, Rimini filed its second amended answer raising six additional affirmative defenses: (12) contract defense; (13) privilege; (14) economic interest; (15) consent; (16) preemption; (17) lack of contract; and (18) mitigation of damages. Doc. #153. After the filing of Rimini's second amended answer Oracle filed its initial motion for partial summary judgment addressing its first cause of action for copyright infringement as it related to Oracle's PeopleSoft, J.D. Edwards, and Siebel-branded Enterprise Software programs; and on Rimini's second, third, and sixth affirmative defenses. Doc. #237. On February 13, 2014, the court granted in-part and denied in-part Oracle's initial motion for partial summary judgment. *See* Doc. #474.

Subsequently, Oracle filed the present second motion for partial summary judgment addressing its first cause of action for copyright infringement; Rimini's second, eighth, and ninth affirmative defenses; and Rimini's first and third counterclaims. Doc. #405.

II. Legal Standard

Summary judgment is appropriate only when the pleadings, depositions, answers to interrogatories, affidavits or declarations, stipulations, admissions, and other materials in the record show that "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In assessing a motion for summary judgment, the evidence, together with all inferences that can reasonably be drawn therefrom, must be read in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001).

The moving party bears the initial burden of informing the court of the basis for its motion, along with evidence showing the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). On those issues for which it bears the burden of proof, the moving party must make a showing that is "sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party." *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986); *see also Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1141 (C.D. Cal. 2001).

To successfully rebut a motion for summary judgment, the non-moving party must point to facts supported by the record which demonstrate a genuine issue of material fact. *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 738 (9th Cir. 2000). A "material fact" is a fact "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Where reasonable minds could differ on the material facts at issue, summary judgment is not appropriate. *See v. Durang*, 711 F.2d 141, 143 (9th Cir. 1983). A dispute regarding a material fact is considered genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Liberty Lobby*, 477 U.S. at 248. The mere existence of a scintilla of evidence in support of the party's position is insufficient to establish a genuine dispute; there must be evidence on which a jury could reasonably find for the party. *See id.* at 252.

III. Discussion

This motion concerns Oracle's first cause of action for copyright infringement as it relates to defendant Rimini's alleged copying of Oracle Database. *See* Doc. #405. This motion also concerns Rimini's second affirmative defense for express license as it relates to Oracle Database; eighth affirmative defense for statute of limitations; ninth affirmative defense for laches; first counterclaim for defamation, business disparagement and trade libel; and third counterclaim for unfair competition in violation of California Business and Professional Code, Cal. BPC § 17200. *Id.* The court shall address each issue separately below.

A. Copyright Infringement (First Cause of Action)

To establish a *prima facie* case of copyright infringement, Oracle must show (1) ownership of the relevant copyrights, and (2) copying of protected expression by Rimini. *Range Road Music, Inc. v. East Coast Foods, Inc.*, 668 F.3d 1148, 1153 (9th Cir. 2012); *Funky Films, Inc. v. Time Warner Entm't Co.*, 462 F.3d 1072, 1076 (9th Cir. 2006).

Oracle's claim for copyright infringement, as it relates to the present motion, arises from Rimini's copying and use of six copyrighted versions of Oracle Database. It is undisputed that Oracle owns all six copyrights at issue. *See* Doc. #400, Amended Stipulation Re: Copyright Registration and Copies, ¶8 ("For the purposes of this action, [Rimini] will not dispute that [Oracle] is the owner or exclusive licensee of the 100 registered works listed in Exhibit A); Exhibit A (listing TX 5-222-106 (Oracle 8i Enterprise: Edition Release 2 (8.1.6)), TX 5-673-282 (Oracle 9i Database Enterprise Edition, Release 2), TX 6-938-648 (Oracle Database 10g: Release 1), TX 6-942-003 (Oracle Database 10g: Release 2), TX 7-324-157 (Oracle Database 11g: Release 1), and TX 7-324-158 (Oracle Database 11g: Release 2)). Further, it is undisputed that Rimini copied Oracle's copyright protected software when it built development, or non-production, environments for a number of Rimini customers using Oracle Database.[3]

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[3] As several Rimini clients use Oracle Database as part of their licensed Enterprise Software platforms, Rimini creates instances of Oracle Database on its own servers (known as environments) to support these clients. Generally speaking, Rimini uses Oracle Database to support its clients in two

See e.g., Doc. #411, Exhibit 25, Attachment B to Rimini's First Supp. Response to Interrogatory 18 (identifying twenty-five (25) separate copies of Oracle Database on Rimini's servers). Based on these undisputed facts, the court finds that Oracle has established a *prima facie* case of copyright infringement. *See e.g., Triad Sys. Corp. v. Se. Express Co.*, 64 F.3d 1330, 1335 (9th Cir. 1995) (*prima facie* case of copyright infringement found where defendant was "copying [plaintiff's] entire [computer] programs" in order to provide software and maintenance support); *MAI Sys. Corp. v. Peak Computer Corp.*, 991 F.2d 511, 517-19 (9th Cir. 1993) (affirming summary judgment on the claim of copyright infringement where defendant copied plaintiff's software onto its systems to provide competing software maintenance services).

However, Oracle's claim of copyright infringement is subject to Rimini's challenged affirmative defense of express license. Therefore, the court must address this affirmative defense before

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different ways. First, Rimini uses Oracle Database for development of updates to all clients running a particular version of the database software. Second, Rimini uses Oracle Database to address technical and support issues unique to a particular client by creating a non-production environment of the entire software program that mirrors the client's production environment (the copy of the licensed software used by the client on its own system). These non-production environments, which include both the application component (like Oracle's PeopleSoft, J.D. Edwards, and Siebel-branded programs) and database component (Oracle Database), are then used to replicate support issues and test potential fixes specific to that client without impacting the client's production environment.

determining whether Oracle is entitled to summary judgment on this claim.

B. Express License (Second Affirmative Defense)

Express license is an affirmative defense. *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1114 (9th Cir. 2000). As the party alleging the affirmative defense, Rimini has the initial burden to identify any license provision(s) that it believes excuses its infringement. *Michaels v. Internet Entm't Group, Inc.*, 5 F. Supp. 2d 823, 831 (C.D. Cal. 1998). If Rimini identifies any relevant license provision, Oracle may overcome the defense of express license by showing that Rimini's conduct exceeded the scope of that provision. *LGS Architects, Inc. v. Concordia Homes*, 434 F.3d 1150, 1156 (9th Cir. 2006).

Construing the scope of a license is principally a matter of contract interpretation. *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1088 (9th Cir. 1989). The starting point for the interpretation of any contract is the plain language of the contract. *Klamatch Water Users Protective Ass'n v. Patterson*, 20 F.3d 1206, 1210 (9th Cir. 1999) ("Whenever possible, the plain language of the contract should be considered first."). When a contract contains clear and unequivocal provisions, those provisions shall be construed according to their usual and ordinary meaning. *Id.* Then, using the plain language of the contract, the court shall effectuate the intent of the parties. *Id.* at 1210 ("Contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself."). However, if a contract term is ambiguous, the court may look

beyond the plain language of the contract to determine the intent of the parties. *See e.g., Foad Consulting Grp., Inc. v. Azzalino*, 270 F.3d 821, 828 (9th Cir. 2001) ("If a party's extrinsic evidence creates the possibility of an ambiguity, a court may not rely on the text of the contract alone to determine the intent of the parties."). A contract term is ambiguous if it is "reasonably susceptible to more than one interpretation." *Shelton v. Shelton*, 78 P.3d 507, 510 (Nev. 2003).

In its express license affirmative defense, Rimini asserts that its copying of Oracle Database was expressly authorized by both the Developer License and its own clients' OLSAs. As each license is different in scope and application, the court shall address each license separately.

1. Developer License

As part of its business model, Oracle makes copies of Oracle Database available for download from the Oracle Technology Network website ("OTN"). These copies of Oracle Database are provided free of charge to software developers to facilitate the development of new software applications that will run on Oracle Database as the database component. The obvious and undisputed purpose of offering Oracle Database free of charge to software developers is to encourage those developers to create new software applications that run on Oracle Database so that when those new applications are commercialized, they will drive additional licensing of Oracle Database.

In order to download a free "developer" copy of Oracle Database through OTN, a developer must

agree to the terms of the Developer License.[4] The Developer License provides in relevant part that:

> [Oracle] grant[s] you a nonexclusive, nontransferable limited license to use [Oracle Database] only for the purpose of developing, testing, prototyping and demonstrating your application, and not for any other purposes. If you use the application you develop under this license for any internal data processing or for any commercial or production purposes, or you want to use [Oracle Database] for any purpose other than as permitted under this agreement, you must obtain a production release version of [Oracle Database] . . . to obtain the appropriate license.
>
> . . .
>
> [Oracle Database] may be installed on one computer only, and used by one person in the operating environment identified by us. You may make one copy of the programs for backup purposes.
>
> . . .
>
> You may not: [] use [Oracle Database] for your own internal data processing or

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[4] A full and complete copy of the January 24, 2006 Developer License (the parties' agreed upon operative license) is attached as Exhibit 4 to Oracle's Appendix of Exhibits provided in support of Oracle's second motion for partial summary judgment. Doc. #411, Exhibit 4.

> for any commercial or production purposes, or use [Oracle Database] for any purpose except the development of a single prototype of your application; [] use the application you develop with [Oracle Database] for any internal data processing or commercial or production purposes without securing an appropriate license from us; [or] continue to develop your application after you have used it for any internal data processing, commercial or production purpose without securing an appropriate license from us . . . .

Doc. #411, Exhibit 4, p.1.

In its affirmative defense, Rimini argues that the Developer License expressly authorizes it to copy and use Oracle Database to develop and test software updates and bug fixes on its own systems in order to provide contracted software support services to its clients. *See* Doc. #436, p.9-12. Rimini further contends that the Developer License expressly authorizes Rimini's commercialization of all the updates and fixes it develops using those copies of Oracle Database. *Id.*

The court has reviewed the documents and pleadings on file in this matter and finds that the plain, unambiguous language of the Developer License does not expressly authorize Rimini to make unlimited copies of Oracle Database on its own systems or use those copies of Oracle Database to create commercial support services for its clients - including software updates and bug fixes. First, the plain language of the Developer License provides that only a single copy of Oracle Database may be

downloaded and used by a developer to develop its application. *See* Doc. #411, Exhibit 4 ("[Oracle Database] may be installed on *one computer only*, and used by one person in the operating environment identified by us.") (emphasis added). Here, it is undisputed that Rimini downloaded twenty-five (25) distinct instances of Oracle Database and that its servers contain over two hundred (200) copies of Oracle Database in various clients' non-production environments, well above the single copy authorized by the Developer License. *See* Doc. #411, Exhibit 25.

Second, the Developer License authorizes only the development, testing, prototyping, and demonstration of the developer's own software application. Doc. #411, Exhibit 4 ("[Oracle] grant[s] you a nonexclusive, nontransferable limited license to use [Oracle Database] only for the purpose of developing, testing, prototyping and demonstrating your application, and not for any other purposes."). The record in this action establishes that Rimini did not create or develop a separate software application within the meaning of the Developer License. Rather, it is undisputed that Rimini used the copies of Oracle Database on its servers solely to create updates and software fixes for other software applications like Oracle's PeopleSoft, J.D. Edwards, and Siebel-branded Enterprise Software programs.

The ordinary definition of "application" in the computer software context is a complete, self-contained computer program that performs a specific function or operation for an end user.[5] *See e.g.*,

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[5] Examples of applications include company accounting and human resource programs like Oracle's PeopleSoft, J.D. Edwards, and Siebel-branded programs; spreadsheet programs

Business Dictionary, http://www.businessdictionary.com/definition/application-software.html (last visited July 16, 2014) (defining "application software" as a "[c]omplete, self-contained computer program (usually a commercially produced, shrink-wrapped software) that performs a specific useful task, other than system maintenance functions (which are performed by utility programs)."); Techterms, http://www.techterms.com/definition/application (last visited July 16, 2014) ("An application, or application program, is a software program that runs on your computer. Web browsers, e-mail programs, word processors, games, and utilities are all applications. The word "application" is used because each program has a specific application for the user."); Technopedia, http://www.techopedia.com/definition/4224/application-software (last visited July 16, 2014) (defining "application software" as "a program or group of programs designed for end users. The programs are divided into two classes: system software and application software. While system software consists of low-level programs that interact with computers at a basic level, application software resides above system software and includes database programs, word processors, spreadsheets, etc. . . . Application software may simply be referred to as an application.").

In contrast, an "update" (or patch, bug fix, etc.) is a developer-created modification to an already

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like Microsoft Excel; word processing programs like Microsoft Word; and illustration programs like Adobe Photoshop.

existing application designed to address and fix technical problems or make functional changes to the application. *See e.g.*, Microsoft Support, http://support.microsoft.com/kb/824684 (last visited July 16, 2014) (defining "update" as "[a] widely released fix for a specific problem"); *What is the Difference Between a Software Upgrade and a Software Update?*, About.com, http://financialsoft.about.com/od/softwaretitle1/f/upgradevupdate.htm (last visited July 16, 2014) ("A software update provides bug fixes for features that aren't working quite right and minor software enhancements, and sometimes include new drivers to support printers or DVD drivers. A software update is sometimes called a patch because it is installed over software you're already using and isn't a full software package installation.").

The evidence in this action supports the court's construction of "application" and "update." For example, Oracle's technical expert, Dr. Randall Davis ("Dr. Davis"), recognized the inherent difference between an update and an application. In his expert report, Dr. Davis stated that "updates are crucial to the correct operation of applications like PeopleSoft." Doc. #436, Exhibit 11, Expert Report of Dr. Randall Davis, p.13. He further noted that many applications - like Oracle's Enterprise Software platforms - "automate processes relevant to the various tax and regulatory regimes [and] must be updated continually as a consequence of these changes." *Id.* This expert opinion testimony supports the court's conclusion that Rimini's developed updates are separate from and distinct to an application. Therefore, Rimini's use of Oracle Database to create updates and fixes for Oracle's Enterprise Software programs, rather than for the

development of its own applications, is outside the scope of the Developer License.

Finally, the court finds that the Developer License also precludes Rimini's use of Oracle Database for commercial purposes. In particular, the Developer License expressly states that: "You may not: [] use [Oracle Database] . . . for any commercial or production purposes . . . without securing an appropriate license from us; [or] continue to develop your application after your have used it for any . . . commercial or production purpose without securing an appropriate license from us." Doc. #411, Exhibit 4, p.1. The scope of this license provision authorizes the use of Oracle Database *only* for the initial stages of developing an application. *Id.* (stating that a licensee may use Oracle Database only "for the purpose of developing, testing, prototyping, and demonstrating your application, and not for any other purpose."). In fact, the plain language of this provision specifically precludes the use of Oracle Database for any commercial purpose absent securing an appropriate license from Oracle.[6] Here, it is undisputed that Rimini used Oracle Database for commercial purposes when it provided its developed updates and bug fixes to its software support services clients for a fee. *See e.g.*, Doc. #412, Exhibit 38, Chris Limburg March 9, 2010 e-mail ("Also, something to be aware of that we are using development oracle software that I don't think is licensed. Just don't want that to fall back on us if we get audited. Cause you can download oracle software from there [sic] site but not

[6] It is undisputed that Rimini did not acquire its own appropriate license for commercial use of Oracle Database.

make money and were [sic] making a crap load of money from there [sic] free stuff :) "). Therefore, the court finds that Rimini's commercialized use of the updates it creates with Oracle Database is not authorized by the Developer License. Accordingly, the court finds that Rimini's express license defense relating to the Developer License fails as a matter of law.

2. Oracle License and Service Agreement

Oracle also licenses Oracle Database to its Enterprise Software customers through OLSAs. The OLSAs permit Oracle's licensed customers to use Oracle Database subject to certain licensing restrictions.[7] In its affirmative defense, Rimini argues that its clients' OLSAs expressly authorize its copying and use of Oracle Database on its own systems and for its development of updates in order to provide contracted software support services to those clients. In support of its affirmative defense, Rimini identifies two license provisions: (1) Section C permitting use of Oracle Database to agents and contractors that provide services to the licensee; and (2) Section D permitting copying of the software. *See* Doc. #436, p.12-16.

Initially, Oracle argues that Rimini may not assert its clients' OLSAs in its express license affirmative defense because Rimini did not obtain copies of Oracle Database from its clients. Rather, Rimini obtained its copies of Oracle Database from

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[7] A full and complete copy of Oracle's standard OLSA is attached as Exhibit 2 to Oracle's Appendix of Exhibits provided in support of Oracle's second motion for partial summary judgment. Doc. #411, Exhibit 2.

the OTN and, as such, its use of Oracle Database is restricted solely to the provisions of the Developer License. The court agrees.

As part of its affirmative defense, Rimini has the burden of identifying a relevant software license excusing its infringement of Oracle's copyrighted Oracle Database software. *See e.g., Michaels*, 5 F. Supp. 2d at 831 (holding that to establish the affirmative defense of express license, a defendant must identify a license that authorized it to copy the protected work). The court finds that Rimini cannot meet this burden and, thereby, cannot invoke the OLSAs in this action because Rimini did not obtain its copies of Oracle Database from clients who had an OLSA for Oracle Database. It is undisputed that Rimini obtained its copies of Oracle Database only by downloading these copies from the OTN. Doc. #411, Exhibit 7, Lester Depo., p.79:16-80:8 ("Q. Where did Rimini obtain the database software that ended up in the "For Development Use Only" folder? A. I believe it was obtained from OTN. Q. Are you speaking of the Oracle technology network? A. That's correct."); p.84:1-85:1 ("Q. When Rimini downloaded Oracle database software from OTN, did Rimini use customer credentials to perform the download? A. I don't believe that they did. [] Q. And you don't need the install media for Oracle database because you already have obtained the database software library from OTN; is that correct? A. Correct.").

In order to download Oracle Database from OTN, a developer is required to agree to the terms and conditions of the Developer License. The Developer License states that "you are bound by the Oracle Technology Network (OTN) License agreement terms" and that "[w]e are willing to license the

programs to you only upon the condition that you accept all of the terms contained in *this* agreement." Doc. #411, Exhibit 4, p.1 (emphasis added). Further, the Developer License provides that "[i]f you are not willing to be bound by these terms, select the 'Decline License Agreement' button and the registration process will not continue." *Id.* Finally, the Developer License states that "this agreement is the complete agreement for the programs and licenses, and this agreement supersedes all prior or contemporaneous agreements or reproductions." *Id.*, p.2. Thus, by downloading all copies of Oracle Database from OTN, Rimini expressly agreed that its use of Oracle Database would be governed only by the Developer License and not by any other agreement. Therefore, because Rimini received its copies of Oracle Database only by downloading them from OTN, the court finds that Rimini may not assert its clients' OLSAs as part of its express license defense.

However, even if Rimini was allowed to assert its clients' OLSAs in this action, the court finds that, as addressed below, the OLSAs do not expressly authorize Rimini's accused conduct.

a. Section C

Section C of the OLSAs states in pertinent part that the licensee has "the limited right to use [Oracle Database] and receive any service [the licensee] ordered solely for [the licensee's] internal business operations. [The licensee] may allow [its] agents and contractors to use [Oracle Database] for this purpose . . . ." Doc. #411, Exhibit 2, Section C. Rimini contends that this provision expressly authorizes it to use Oracle Database on its own systems and under

its control in order to provide contracted software support services to its clients. *See* Doc. #436, p.13-14.

The court has reviewed the documents and pleadings on file in this matter and finds that the plain, unambiguous language of Section C does not expressly authorize Rimini to make copies of the licensed software. First, Section C authorizes "use" of the software. The right to use the licensed software is separate from a right to reproduce or copy the software, and there is no evidence before the court that Rimini, as a third-party service provider, cannot perform its contracted services without having its own copy of the software on its own systems. Further, unlike other license provisions, the word "copy" is not found anywhere in Section C. *See, e.g.*, Doc. #411, Exhibit 2, Section D (stating that licensee may make copies of the software). Therefore, the court finds that the plain language of Section C does not authorize Rimini's copying of the database software.

Second, Section C authorizes use of the software only for the licensee's "internal business operations." Doc. #411, Exhibit 2, Section C. Upon review of Rimini's use of Oracle Database, the court finds that none of the non-production environments were used for the licensee's internal business operations. Rather, the undisputed evidence establishes that Rimini used Oracle Database to develop and test updates for its clients. Further, it is undisputed that Rimini used Oracle Database to create updates for all clients using a particular version of a copyrighted software program. Rimini's use of Oracle Database to support multiple customers is also outside the scope of this license provision. Therefore, the court finds

that Section C does not expressly authorize Rimini's copying and use of Oracle Database.

b. Section D

Section D of the OLSAs states in pertinent part that the licensee "may make a sufficient number of copies of each program for [the licensee's] license use . . . ." Doc. #411, Exhibit 2, Section D. Rimini contends that this provision also expressly authorizes it to copy and use Oracle Database on its own systems in order to provide contracted software support services to its clients. *See* Doc. #436, pp.13-14.

The court finds that the plain, unambiguous language of Section D does not expressly authorize Rimini to make copies of the licensed software. First, the plain language of Section D provides that *only* the licensee may make copies of the software. Doc. #411, Exhibit 2, Section D ("[The licensee] may make a sufficient number of copies . . ."). Nowhere does this provision authorize Rimini, as a third party, to make a copy of the licensed software.

Second, Section D authorizes copying of the software only for the licensee's "licensed use." Oracle argues, and the court agrees, that the "sufficient number of copies" provision is subject to the licensing restrictions outlined in Section C of the OLSAs. Section D's "licensed use" language necessarily means that use of any copies of the database software are subject to all other licensing restrictions identified in the license. *See e.g., Threlkeld v. Ranger Ins. Co.*, 202 Cal. Rptr. 529, 532 (Cal. App. 1984) (interpreting the phrase "in accordance with" a set of regulations as incorporating those regulations by reference). As addressed above, the court finds that

none of the copies were used for Rimini's clients' internal business operations as required by Section C. *See supra,* §III (B)(2)(a). Rather, the undisputed evidence established that these copies of Oracle Database were used to develop and test software updates for Rimini. Accordingly, the court finds that Rimini's copying and use of Oracle Database is outside the scope of Section D.

3. Conclusion

Based on the court's rulings above, neither of Rimini's asserted licenses (the Developer License or its clients' OLSAs) expressly authorize its copying of Oracle's copyrighted Oracle Database software as a matter of law. Therefore, the court finds that Oracle is entitled to summary judgment on both its claim of copyright infringement as it relates to Oracle Database and Rimini's second affirmative defense for express license as it relates to Oracle Database. Accordingly, the court shall grant Oracle's second motion for partial summary judgment on these issues.

C. Statute of Limitations (Eighth Affirmative Defense)[8]

Copyright infringement actions must be filed "within three years after the claim accrued." 17 U.S.C. § 507(b); *Roley v. New World Pictures*, 19 F.3d 479, 481 (9th Cir. 1994). A copyright claim accrues "when one has knowledge of a violation or is chargeable with such knowledge." *Roley*, 19 F.3d at 481. One is chargeable with knowledge of a copyright violation if it could have been reasonably discovered. *See Polar Bear Prods. v. Times Corp.*, 384 F.3d 700, 706 (9th Cir. 2004). Thus, "[a] claim for copyright infringement accrues on the date that a reasonable investigation would have put the rights holder on notice that potentially infringing conduct has occurred." *In re Napster, Inc. Copyright Litig.*, 2005 WL 289977, *4 (N.D. Cal. 2005).

Oracle filed the underlying copyright infringement action on January 25, 2010. *See* Doc. #1. Based on the three-year limitations period set forth in 17 U.S.C. § 507(b), Rimini contends in its affirmative defense that Oracle's copyright claims are untimely with respect to any acts or conduct that

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[8] The court notes that Rimini's eighth affirmative defense based on the statute of limitations is raised against all of Oracle's claims for copyright infringement - including Oracle's copyright infringement claims raised in its initial motion for partial summary judgment (Doc. #237) - and not just Oracle's copyright infringement claim related to Oracle Database. Thus, the court's analysis of this affirmative defense encompasses Oracle's entire copyright infringement claim and will refer to infringement issues addressed previously in the court's order granting in-part and denying in-part Oracle's first motion for partial summary judgment (Doc. #474).

occurred prior to January 25, 2007.[9] *See* Doc. #436, pp.16-20. However, as the statute of limitations does not begin to run until the claim accrues, Rimini must establish that Oracle knew or should have known of Rimini's underlying acts or conduct which constitute Oracle's copyright infringement claims prior to January 25, 2007. *See Roley*, 19 F.3d at 481.

In support of its affirmative defense, Rimini argues that Oracle knew or should have known of its infringement prior to January 25, 2007, for two reasons.[10] First, Rimini contends that a series of correspondence between itself and Siebel Systems ("Siebel") (Oracle's predecessor in interest for the Siebel-branded software) in September/October 2005, put Siebel - and thereby Oracle[11] - on notice at that time that Rimini was going to engage in the underlying conduct of copying Oracle's copyrighted

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[9] It is undisputed that Oracle's claims are timely for all acts of copyright infringement that occurred after January 25, 2007.

[10] In its affirmative defense, Rimini argues that Oracle had actual knowledge of the underlying conduct constituting copyright infringement prior to January 25, 2007. *See* Doc. #436. However, the court has reviewed the evidence proffered in this action and finds that there is no evidence that Oracle actually knew, prior to January 25, 2007, that Rimini was copying its Enterprise Software programs onto Rimini's servers. In fact, Rimini has failed to proffer any evidence from Oracle concerning Oracle's knowledge in 2005 and 2006. Therefore, the court finds that Rimini's eighth affirmative defense based on the statute of limitations fails as it relates to Oracle's actual knowledge prior to January 25, 2007. Accordingly, the court shall only address Rimini's arguments that Oracle is chargeable with knowledge of Rimini's conduct in analyzing its eighth affirmative defense.

[11] Oracle acquired Siebel in 2006.

Enterprise Software programs on its own servers and under its own control in order to provide contracted software support services for its clients - conduct which the court has determined constitutes copyright infringement. *See* Doc. #474. Second, Rimini contends that Oracle itself was put on notice of Rimini's conduct of copying Oracle's software when it began shipping its customers' Enterprise Software back-up installation media to Rimini's facilities in 2006. Based solely on these two references, Rimini argues that Oracle is chargeable with knowledge that Rimini was engaged in conduct constituting copyright infringement prior to January 25, 2007, and therefore, the statute of limitations bars any claim for conduct that occurred before that date. The court shall address each argument below.

1. 2005 Correspondence

Rimini launched its business in late 2005, by offering support for Siebel-branded software programs which it later expanded to include Oracle's J.D. Edwards and PeopleSoft-branded software programs in 2006. Doc. #153, ¶21 ("[Rimini] began operations in September 2005, offering a competitive after-market support offering for Siebel software products."); ¶23 ("[Rimini] added support offerings for Oracle's PeopleSoft products in April 2006 and Oracle's JD Edwards products in September 2006."). Rimini began advertising its services in early September 2005.

On September 26, 2005, before Rimini had signed up a single customer, Siebel sent a letter to Rimini addressing Rimini's purported ability to offer maintenance and support services for Siebel's software programs without violating Siebel's

intellectual property rights. Doc. #413, Exhibit 57. Siebel's letter stated in pertinent part:

> "As discussed herein, [Siebel] believes that various statements made by [Rimini] are false and/or misleading, and we hereby demand that Rimini immediately cease its wrongful activities.
>
> . . .
>
> By this letter, we hereby ask [Rimini] to explain in detail how it intends to fulfill the promises it is making to potential customers on its website and in its public comments. Specifically, please advise how [Rimini] intends to provide 'complete maintenance and support services' without access to [Siebel's] source code, programs or confidential, proprietary or trade secret information."

Doc. #413, Exhibit 57.

On October 6, 2005, Rimini responded and assured Siebel that Rimini would be providing independent consulting services to the extent permitted by law and in accordance with any relevant software license agreements while still respecting Siebel's intellectual property rights. Doc. #413, Exhibit 58. Rimini's response letter stated in pertinent part:

> "[Rimini] respects the intellectual property rights of software providers. [Rimini] intends to achieve quality service and customer satisfaction by providing independent consulting services to its clients *to the extent permitted by law, and in accordance with the terms of any relevant software license agreement* in effect with each [Rimini] client.

> . . .
>
> [Rimini's] proposed maintenance and support consulting services . . . require the same software program access as other independent consulting services procured by [Siebel] licensees on a regular basis. . . .
>
> . . .
>
> [Rimini's] alternative maintenance and support services will only provide [Rimini] clients with source code remediation and updates created by [Rimini] as independent consultant projects developed at the request of and on behalf of its . . . clients.
>
> . . .
>
> Updates made by [Rimini] to available [Siebel] software source code will be *in accordance with the individual scope, nature, rights, and terms of the Siebel system license agreements* executed between [Siebel] and each [Rimini] client."

Doc. #413, Exhibit 58 (emphasis added).

Rimini argues that this exchange of letters put Oracle, as Siebel's successor, on notice of Rimini's intention to offer software support services to Oracle's Enterprise Software customers by copying Oracle's copyrighted software onto its own servers. The court disagrees. The court has reviewed the correspondence and finds that Rimini's 2005 letter is insufficient to charge Oracle with knowledge that Rimini intended to copy Oracle's copyrighted works on its own servers and outside the licensee's control.

First, the court finds that Rimini expressly assured Oracle that it would "provid[e] independent

consulting services . . . to the extent permitted by law, and in accordance with the terms of any relevant software license agreement[.]" *Id.* Where a defendant expressly assures competitors that it is not violating the competitor's intellectual property rights, a plaintiff cannot be charged with knowledge of the infringing conduct. *See e.g., William A. Graham Co. v. Haughey*, 568 F.3d 425, 439-41 (3d Cir. 2009) (finding that despite "storm warnings" that defendant was a competitor and was in possession of copyrighted material, it was reasonable for plaintiff to delay filing suit because defendant had "repeatedly agreed to respect [plaintiff's] rights to its intellectual property."). Similarly, mere general knowledge that a competitor is going to enter the market and compete is also insufficient to put a party on notice of copyright infringement. *See Garcia v. Coleman*, 2008 WL 4166854, *7 n.2 (N.D. Cal. 2008) (stating that mere participation in an industry by a competitor is "not enough to establish chargeable knowledge"). Thus, based on the specific assurances by Rimini that it was going to abide by Oracle's intellectual property rights, the court finds that Oracle is not chargeable with knowledge that Rimini was engaging in infringing conduct in late 2005.

Second, even if Rimini had not assured Oracle that it would respect its intellectual property rights and not infringe its copyrights, Rimini's statute of limitations defense would still fail because nowhere in its letter does Rimini state that it planned to copy any copyrighted software onto its own computer systems (as opposed to accessing software on its clients' systems) - the conduct the court has concluded constitutes copyright infringement. The letter repeatedly references Rimini's planned

"access" to its clients' software. Such references cannot put Oracle on notice that Rimini intended to copy the software onto its own computers. Indeed, Rimini employees, including Rimini CEO Seth Ravin, have confirmed that the term "access" was used to describe Rimini working with the licensed software on its clients' systems. *See e.g.*, Doc. #452, Exhibit M, Ravin Depo., pp.476:3-476:9 ("Q. In use of the term, "access" is intended to indicate that [Rimini] will not have a local copy of the software on its systems, but will access the software as it resides on the customer systems? A. That is correct. Remote access is what we refer to."). The distinction between Rimini "accessing" the software on its clients' systems (subject to the terms of those clients' licenses with Oracle) and Rimini installing and copying software on its own systems is plain on its face. And Rimini's continuing reference to "access" cannot have put Oracle on notice that Rimini was engaging in conduct, like copying, not contemplated or mentioned by the letter. Therefore, the court finds that the letter failed to put Oracle on notice of Rimini's conduct, and as such, Oracle is not chargeable with knowledge that Rimini was engaging in copyright infringement in late 2005.

2. Shipment of Back-up Installation Media

In its affirmative defense, Rimini also argues that knowledge of its infringing conduct should be imputed to Oracle because, beginning in 2006, Oracle shipped back-up copies of its customers' Enterprise Software installation media to Rimini's facilities with full knowledge that Rimini was using the installation media to create copies of the software on its own systems to provide support services to its

clients. *See* Doc. #436, pp.17-20. Thus, Rimini argues that Oracle should have known, and is chargeable with knowledge, that Rimini was engaging in conduct which constituted copyright infringement as early as 2006.

The court has reviewed the documents and pleadings on file in this matter and finds that the evidence before the court does not support Rimini's argument. The undisputed evidence in this action establishes that between 2006 and 2009, Oracle shipped at least 90 back-up copies of licensed software installation media to Rimini's facilities for different Oracle Enterprise Software customers. Doc. #261, Exhibit 15, pp.8-9 (recognizing that Oracle shipped software installation media to Rimini for approximately 90 customers from 2006 to 2009). Further, it is undisputed that at the time it shipped the installation media, Oracle had been tracking Rimini's business activities. *See* Doc. #261, Exhibit 20 (e-mail to Oracle executives regarding Rimini dated May 1, 2006); Exhibit 21 (e-mail to Oracle executive concerning Rimini dated April 24, 2006); Exhibit 23 (e-mails reflecting Oracle's Vice President of Competitive Intelligence's tracking of Rimini dated March 2007). Based on this limited evidence, Rimini argues that Oracle not only knew that Rimini was providing software support services to Oracle customers, but, by extension, also knew that Rimini was engaging in copyright infringement by using the back-up copies of the software installation media to create copies of the software on Rimini's systems to service those customers. However, Rimini's assumption of Oracle's knowledge that the back-up copies of the installation media were being used to make copies of the licensed software is not supported by the evidence, and thus, Oracle cannot be charged

with knowledge of Rimini's infringing conduct in 2006.

First, other evidence before the court establishes that these back-up copies, although ultimately shipped to Rimini, were shipped only after Oracle's customers submitted requests to Oracle describing Rimini's address as the customers' "secondary offsite backup location."[12] *See* Doc. #242, Exhibit 33, Rimini's Second Amended Responses to Oracle's Third Set of Requests for Admission, Request #26 ("[A]dmit that more than 50% of the requests asked Oracle to ship the software to an 'offsite backup location.'" "Admitted"); Request #28 ("Admit that, at least 25 times, You instructed a [Rimini] customer or prospective [Rimini] customer to state that software was to be shipped to an "offsite backup location" when that customer or prospective customer requested that Oracle ship software to a [Rimini] address." "Admitted."). In fact, the evidence establishes that Rimini intentionally concealed its identity in these shipping requests by omitting any reference to Rimini on the shipping requests and using only the customer's business name.

Second, Rimini admits that the purpose behind the obfuscated shipping requests was to allow Rimini to create development environments to service Rimini's customers without Oracle's knowledge. *See* Doc. #242, Exhibit 31, Corpuz Depo., p.160 ("Q. It's

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[12] An offsite backup location is one where the software installation media can be held in safety, so that the installation media could be easily retrieved and provided to the customer in the event that the customer's copy of the installation media was lost or destroyed.

true, isn't it, that the reason for the request was for [Rimini] to build an environment on [Rimini's] premises for tax development work? A. I believe so, yes."). Thus, the evidence does not support Rimini's assumption that Oracle knew that it was shipping back-up copies of the software installation media to Rimini's facilities in 2006.

Additionally, there is no evidence that Oracle knew of Rimini's use of the shipped installation media to create copies of the software on Rimini's systems. Rimini admits that the shipping requests were designed so that Oracle would not know that Rimini was using these back up copies of the licensed software. *See* Doc. #242, Exhibit 33, Rimini's Second Amended Responses to Oracle's Third Set of Requests for Admission, Request #30 ("Rimini responds that, having investigated, it is not aware of any requests to Oracle for shipment of Oracle Enterprise Software to a [Rimini] address which expressly stated that the software shipped to a [Rimini] address would be used by [Rimini] to install software on [Rimini's] computers."). Further, Rimini fails to present any evidence that Oracle knew that Rimini was copying the software onto Rimini's systems prior to January 25, 2007. Based on the evidence before the court, the court finds that no reasonable jury could conclude from Oracle's shipments of the installation media to a location described as a "secondary offsite backup location" that Oracle should have had knowledge of Rimini's infringing conduct sufficient for a copyright infringement claim to accrue, and the statute of limitations to begin to run, in 2006.

3. Conclusion

As addressed above, there is no evidence to support the conclusion that Oracle had knowledge that Rimini was engaging in copyright infringement prior to January 25, 2007. Further, the evidence does not support Rimini's argument that Oracle should be charged with knowledge of its infringement prior to January 25, 2007, based either on the 2005 correspondence with Siebel or from Oracle's shipment of back-up installation media to Rimini's facilities. Therefore, the court finds that all of Oracle's claims for copyright infringement are timely. Accordingly, the court shall grant Oracle's motion for summary judgment as to this affirmative defense.

D. Laches (Ninth Affirmative Defense)[13]

Rimini's ninth affirmative defense alleges that Oracle's copyright claims are barred by the doctrine of laches based on Oracle's unreasonable failure to timely file this action. *See* Doc. #436.

To establish a laches defense in a copyright infringement action, a defendant must show that "(1) the plaintiff delayed in initiating the lawsuit; (2) the delay was unreasonable; and (3) the delay resulted in prejudice." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 695 F.3d 946, 949 (9th Cir. 2012). Delay is measured

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[13] Similar to Rimini's eighth affirmative defense for the statute of limitations, Rimini's ninth affirmative defense for laches is raised against all of Oracle's copyright infringement claims and not just the claim related to Oracle Database addressed in this motion. Accordingly, the court shall consider the affirmative defense in its entirety as to all copyright infringement claims.

from when "the plaintiff knew (or should have known) of the allegedly infringing conduct, until the initiation of the lawsuit." *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 952 (9th Cir. 2001). In determining the reasonableness of the delay, courts look to the cause of the delay. *Id.* at 954. Prejudice can exist where "during the delay, [defendant] invested money to expand its business or entered into business transactions based on [its] presumed rights." *Petrella*, 695 F.3d at 953.

In the present motion, Oracle argues that summary judgment is appropriate on Rimini's laches defense because it did not delay in filing suit. *See* Doc. #405, pp.21-23. The court agrees.

When a claim for copyright infringement is brought within the statute of limitations period, there is a strong presumption that there is no unreasonable delay. *See Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 997 (9th Cir. 2006) (holding that if a plaintiff "files suit within the applicable period of limitations for his claim, there is a strong presumption that laches does not bar the claims"); *Novell, Inc. v. Unicom Sales, Inc.*, 2004 WL 1839117, *5-7 (N.D. Cal. 2004) (applying the "strong presumption" that laches does not apply to a copyright claim filed within the applicable limitations period). Only in unusual circumstances will an action filed within the statutory period be considered a sufficiently unreasonable delay to permit a laches defense. *See Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 950-54 (9th Cir. 2001) (finding that laches defense applied when re-released DVD material was identical in nature to an original infringing work and that although the statute of limitations would permit the lawsuit, the thirty-six

year time lapse from the initial infringement was an unreasonable delay sufficient to support a laches defense).

Here, as addressed above, the court finds that Oracle did not have knowledge, nor is Oracle chargeable with knowledge, of Rimini's conduct prior to January 25, 2007. *See supra*, § III(C). As such, there is a strong presumption that Oracle did not delay in filing this action. Further, there are no unusual circumstances that would overcome the strong presumption that there is no delay. Finally, Rimini has failed to establish that it was prejudiced by Oracle's alleged delay. Thus, as the period for both the equitable and statutory periods accrued at the same time, the court finds that it would be inequitable to bar Oracle's claims for copyright infringement that were brought within the statutory period. Accordingly, the court shall grant Oracle's motion as to this affirmative defense.

E. Defamation (First Counterclaim) and Unfair Competition (Third Counterclaim)

Finally, Oracle moves for summary judgment on Rimini's two remaining counterclaims for defamation, business disparagement and trade libel; and unfair competition pursuant to Cal. BPC § 17200.[14]

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[14] California's unfair competition statute prohibits any unfair competition, which is defined as "any unlawful, unfair, or fraudulent business practice or act." Cal BPC §§ 17200, *et seq.* In its counterclaim, Rimini alleges that Oracle engaged in fraudulent business practices by making defamatory statements that have harmed Rimini's business activities. *See* Doc. #153.

To establish a claim for defamation, Rimini must establish: (1) a false and defamatory statement by Oracle concerning Rimini; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages. *Wynn v. Smith*, 16 P.3d 424, 427 (Nev. 2001). A statement may be defamatory only if it contains a factual assertion that can be proven false. *See Flowers v. Carville*, 112 F. Supp. 2d 1202, 1210 (D. Nev. 2000). The determination of whether a statement contains a defamatory factual assertion is a question of law. *Rodriguez v. Panayiotou*, 314 F.3d 979, 985 (9th Cir. 2002); *see also Branda v. Sanford*, 637 P.2d 1223, 1225-26 (Nev. 1981).

In its affirmative defense, Rimini alleges three separate statements made by Oracle representatives between March 2009 and March 2010 to potential customers of Rimini and members of the press were defamatory in nature and harmed Rimini's business. The alleged defamatory statements are as follows:

- Statement #1: Rimini alleges that in March 2009, an unidentified Oracle employee made unspecified statements to industry analyst Pat Phelan of Gartner Research insinuating that Rimini's business practices were illegal. *See* Doc. #413, Exhibit 68.

This claim is derivative of Rimini's counterclaim for defamation. As such, the court's ruling on Rimini's defamation counterclaim applies with equal force and weight to Rimini's unfair competition counterclaim and, therefore, the court shall limit its discussion solely to the defamation counterclaim.

- Statement #2: Rimini alleges that on March 29, 2010, Oracle spokesperson Deborah Hellinger ("Hellinger") made statements to the press in response to the filing of Rimini's answer and counterclaims in this action in which Hellinger stated that Rimini had engaged in "massive theft" of Oracle's intellectual property. *See* Doc. #413, Exhibit 68, Rimini's First Supplemental Response to Interrogatory 16 ("Oracle spokesperson Deborah Hellinger publically accused [Rimini] on March 29, 2010 of engaging in 'massive theft' of Oracle's intellectual property.").
- Statement #3: Rimini alleges that on January 30, 2010, Oracle Regional Services Sales Manager James McLeod ("McLeod") sent an email forwarding an article from *Information Week* to the Vice President of Liz Claiborne, Inc., a Rimini customer. The article allegedly contained Oracle's allegations from this lawsuit including allegations of Rimini's "massive theft" of Oracle's intellectual property. *See* Doc. #413, Exhibit 68, Rimini's First Supplemental Response to Interrogatory 16 ("Further, on January 30, 2010, James McLeod, a Regional Services Sales Manager for Oracle, sent an e-mail to Kerry Fogarty, a Vice President at Liz Claiborne, Inc., containing statements that [Rimini] had obtained 'Oracle's software and related support materials through an illegal business model,' including 'massive theft.'").

In its motion, Oracle raises four arguments for why it is entitled to summary judgment on Rimini's defamation counterclaim. Specifically, Oracle argues

that: (1) Rimini, as a limited purpose public figure, has failed to proffer any evidence that the alleged statements were made with actual malice, as opposed to mere negligence; (2) the alleged defamatory statements are true; (3) McLeod's statements are additionally protected by the fair reporting privilege; and (4) with respect to Rimini's trade libel claim, Rimini has failed to proffer any evidence of special damages. *See* Doc. #405. The court shall address each argument below.

1. Malice

In its motion, Oracle contends that Rimini is a limited purpose public figure and must therefore establish actual malice on the part of Hellinger and McLeod[15] in making the allegedly defamatory statements.

The determination of whether a party is a public figure, or a limited purpose public figure, is an issue of law to be decided by the court. *See Tavoulareas v. Piro*, 817 F.2d 762, 772 (D.C. Cir. 1987) ("Whether (and to what extent) a person is a public figure is a matter of law for the court to decide."). A person or company may become "a general purpose public figure only if he [] is 'a well-known celebrity, his name a household word.'" *Id.* (quoting *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1294 (D.C. Cir. 1980). "Although few persons obtain the level of notoriety to be public figures in all contexts,

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[15] In its opposition to Oracle's second motion for partial summary judgment, Rimini states that it has elected not to rely on the statements made to Pat Phelan to support its claim for defamation. *See* Doc. #436, p.7. Accordingly, the court shall grant Oracle's motion as to this statement.

individuals may be public figures for the more limited purpose of certain issues or situations." *Id.* A person or company can be a limited purpose public figure when three factors are met. *Id.* "First, there must be a public controversy, which means the issue was debated publicly and had foreseeable and substantial ramifications for nonparticipants." *Medifast, Inc. v. Minkow*, 2011 U.S. Dist. LEXIS 33412, *12 (S.D. Cal. 2011). Second, the person's role in the controversy must be more than "trivial or tangential." *Tavoulareas*, 817 F.2d at 773 (citing *Waldbaum*, 627 F.2d at 1297). This factor requires the person to "have undertaken some voluntary act through which he or she sought to influence resolution of the public issue." *Medifast*, 2011 U.S. Dist. LEXIS 33412, *12. However, an individual does not become a limited purpose public figure "merely by stating a position on a controversial issue if he or she is not a principal participant in the debate or is unlikely to have much effect on its resolution." *Tavoulareas*, 817 F.2d at 773. Finally, the alleged defamation must be germane to the person's participation in the controversy. *Id.*; *Medifast*, 2011 U.S. Dist. LEXIS 33412, *12.

The court has reviewed the documents and pleadings on file in this matter and finds that Rimini is not a limited purpose public figure as it relates to Oracle's allegedly defamatory statements. First, the court finds that there was not a sufficiently public controversy over which Rimini expressed its opinions. In its motion, Oracle identifies the public controversy as the legality of third-party support services to Oracle's Enterprise Software programs arising out of Oracle's lawsuit against non-party SAP, *Oracle v. SAP AG*, Case no. 07-01658 (N.D. Cal.). Initially, the court notes that this controversy

was not widely publicized or addressed in the public sphere such that it created a public controversy. Rather, the controversy took place within the confines of the litigation and attracted sparse media attention. Further, the business methods addressed by the lawsuit were specific to SAP and not to Rimini or other third-party developers, and Oracle has conceded generally that third-party software support services are permissible in the market. Thus, the court finds that the controversy identified by Oracle was not likely to have "foreseeable and substantial ramifications for nonparticipants" sufficient to create a public controversy. *See Medifast*, 2011 U.S. Dist. LEXIS 33412, *12.

Second, the court finds that even if the *SAP* litigation could constitute a public controversy, Rimini's limited statements were not likely to have an effect on the controversy. Rimini's limited comments are summarized as follows:

- Comment #1: On May 17, 2006, Rimini sent an email to Vauhini Vara from the Wall Street Journal in which Rimini stated that: "Siebel Agreements generally allow third party access rights and modification rights to provide source code, BUT ALSO seem to have specific terms to exclude 'access rights' for those parties who are also 'direct competitors' like SAP - especially SAP . . . the clearest definition of a 'direct competitor' for Siebel/Oracle. . . . [Rimini] is clearly not a 'direct competitor' any more than the thousands of other independent consultants and firms who provide services to Siebel clients. We are not a software manufacturer, and do not directly compete in the software

vendor arena. We provide services to clients in order to make their Siebel/Oracle software work properly and smoothly. . . . Therefore, as a specialized consulting firm, [Rimini] has clear competitive advantage in serving the entire Siebel client base without the sales and market challenges faced by SAP/TomorrowNow." Doc. #414, Exhibit 79.

- Comment #2: On March 23, 2007, Rimini CEO Ravin is quoted as providing insight into the lawsuit and differentiating Rimini's practices in an article entitled "Solution Providers: Oracle Suing SAP Over Standard Industry Practice." Doc. #414, Exhibit 80.

- Comment #3: On March 27, 2007, Rimini CEO Ravin is quoted as saying that "Oracle's lawsuit is not about [SAP] offering third party support" in an article appearing in *The Enterprise Spectator* entitled "Oracle/SAP lawsuit: view from Rimini Street." Doc. #414, Exhibit 81.

- Comment #4: On July 12, 2007, Rimini Vice President of Global Marketing and Alliances, David Rowe ("Rowe"), offered his opinion on the *SAP* litigation and Rimini's options of working with SAP in the future in an article appearing on *eWeek* entitled "Oracle Suit Against SAP Raises Customer Concerns." Doc. #414, Exhibit 82.

- Comment #5: On April 25, 2008, Rowe was quoted as stating that "[Rimini], as we have commented previously, has safeguards in place to keep such issues from occurring in its operations" in an article in *CIO* entitled

"Oracle v. SAP Legal Fight Gets Messier, Raises Tough Questions About Third-Party Maintenance." Doc. #414, Exhibit 83.

The court finds that these comments were not directed at the public in order to influence resolution of the litigation or some broader issue about third-party software support, but were directed to increase Rimini's exposure and business. Rimini's limited and sporadic comments on the litigation in which Rimini primarily comments on its own business practices does not raise to the level of Rimini inserting itself into the controversy, and Rimini did not abuse its privilege when it simply stated why it believed its business model was legal in comparison to SAP's business practices. Thus, the court finds that Rimini is not a limited purpose public figure and therefore, Rimini does not have to establish actual malice by Hellinger and McLeod in making the allegedly defamatory statements.

2. Truth

In the alternative, Oracle argues that even if Rimini does not have to prove actual malice, the court should still grant summary judgment on Rimini's defamation counterclaim because the two allegedly defamatory statements are true. The court agrees.

Truth is an absolute defense to defamation. *See Flowers*, 112 F. Supp. 2d at 1210. Here, both statements (Hellinger's statement and McLeod's statement) that Rimini engaged in "massive theft" of Oracle's intellectual property are true. It is undisputed that Rimini engaged in theft of Oracle's intellectual property by repeatedly making multiple copies of Oracle's copyrighted Enterprise Software

programs to support its software support service clients beginning in 2005.

Although Rimini argues in its opposition that theft and copyright infringement are different, the court finds that the semantic distinction between copyright infringement and theft does not matter in this instance. First, it is not the literal truth of "each word or detail used in a statement which determines whether or not it is defamatory; rather, the determinative question is whether the 'gist or sting' of the statement is true or false." *Ringler Assocs. v. Maryland Cas. Co.*, 80 Cal. App. 4th 1165, 1180-82 (2000). Applying these principles, courts consistently hold that the imprecise use of legal terminology does not qualify as defamation when the terminology provides the gist of the actual claims. *Id.*

Second, there is no meaningful distinction between "theft" and "copyright infringement." One of the leading Ninth Circuit copyright infringement cases refers to the copyright infringement defendant as an "ordinary thief." *Polar Bear*, 384 F.3d at 709. Further, the Supreme Court has stated that "deliberate unlawful copying is no less an unlawful taking of property than garden-variety theft." *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Inc.*, 545 U.S. 913, 961 (2005). Therefore, because the court has found that Rimini has engaged in copyright infringement, it is true that Rimini has engaged in theft of Oracle's intellectual property. Therefore, the court shall grant Oracle's motion as to Rimini's defamation counterclaim.

3. Fair Reporting Privilege and Trade Libel

Because the court has found that the allegedly defamatory statements are true, and therefore, there is no defamation as a matter of law, the court finds that it is unnecessary to determine if McLeod's statement is also protected by the fair reporting privilege or address whether Rimini has proffered evidence of special damages sufficient to establish its claim for trade libel.

IV. Conclusion

In conclusion, the court finds, consistent with the rulings above, that Oracle has established a *prima facie* case of copyright infringement as it relates to the identified copies of Oracle Database. *See supra*, § III(A). Further, the court finds that Oracle is entitled to summary judgment on Rimini's second affirmative defense of express license also as it relates to Oracle Database. *See supra*, §§ III(B)(1) & (2). The court also finds that Oracle is entitled to summary judgment on Rimini's eighth affirmative defense for statute of limitations and ninth affirmative defense for laches. *See supra*, §§ III(C) & (D). Finally, the court finds that Oracle is entitled to summary judgment on Rimini's first counterclaim for defamation, business disparagement, and trade libel, as well as Rimini's third counterclaim for unfair competition. *See supra*, § III(E). Accordingly, the court shall grant Oracle's present motion for partial summary judgment in accordance with these findings.

Following entry of this order, the parties shall have sixty (60) days to submit a proposed joint pre-trial motion in accordance with Local Rules 16-3 and

16-4. In the proposed pre-trial order, the parties shall submit a list of three agreed-upon trial dates. If the parties are unable to agree upon proposed trial dates, or desire a case management conference to set a trial or motion schedule following the submission and acceptance of the proposed joint pre-trial order, the parties may seek such a conference at that time.

IT IS THEREFORE ORDERED that plaintiffs' motion for partial summary judgment (Doc. #405) is GRANTED in accordance with this order.

IT IS FURTHER ORDERED that the clerk of court shall enter judgment in favor of plaintiffs Oracle USA, Inc.; Oracle America, Inc.; and Oracle International Corporation; and against defendant Rimini Street, Inc., on plaintiffs' first cause of action for copyright infringement as it relates to Oracle Database.

IT IS FURTHER ORDERED that the clerk of court shall enter judgment in favor of plaintiffs Oracle USA, Inc.; Oracle America, Inc.; and Oracle International Corporation; and against defendant Rimini Street, Inc., on defendant's second affirmative defense for express license as it relates to plaintiffs' claim for copyright infringement arising from defendant's copying of Oracle Database.

IT IS FURTHER ORDERED that the clerk of court shall enter judgment in favor of plaintiffs Oracle USA, Inc.; Oracle America, Inc.; and Oracle International Corporation; and against defendant Rimini Street, Inc., on defendant's eighth affirmative defense for statute of limitations; ninth affirmative defense for laches; first counterclaim for defamation, business disparagement, and trade libel; and third counterclaim for unfair competition.

IT IS FURTHER ORDERED that the parties shall have sixty (60) days following entry of this order to submit a proposed joint pre-trial motion in accordance with both Local Rules 16-3 and 16-4.

IT IS SO ORDERED.

DATED this 12th day of August, 2014.

s/Larry R. Hicks
LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

[264] UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BEFORE THE HONORABLE LARRY R. HICKS,
DISTRICT JUDGE

ORACLE USA, INC., a Colorado corporation; ORACLE AMERICA, INC., a Delaware corporation; and ORACLE INTERNATIONAL CORPORATION, a California corporation, Plaintiffs, vs. RIMINI STREET, INC., a Nevada corporation; and SETH RAVIN, an individual, Defendants.	No. 2:10-cv-0106-LRH-PAL

TRANSCRIPT OF JURY TRIAL - DAY 3

(Pages 264 through 491)

September 16, 2015

Las Vegas, Nevada

* * *

[271] No. 1, which will be the first exhibit in your binder. It's also going on your screen. It's also been preadmitted so we can see it on the screen.

And, Matt, can you blow up the middle so we can see that email there.

SETH RAVIN

recalled as a witness on behalf of the Plaintiffs, having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION RESUMED

BY MR. ISAACSON:

Q. This email is very small print for who it's from and to, but this is an email from that vice-president,

Mr. Chiu, to you, Mr. Ravin. This is on March 30th, 2006. Mr. Chiu writes to you, "Yes. Dan's the man" -- that's Dan Slarve; is that right?

A. Yes.

Q. One of your vice-presidents?

A. Yes.

Q. And he found the most "recent development," and he cites a website, edelivery.oracle.com.

And he says, "They'll start putting any available patches that come out on that public portal for download. The portal asks for some basic information?"

He says what that is, and then goes on to say,

[272] "It does not 'check' the info entered against any license agreement. So basically it's an open door to their software."

Now, that's referring to Oracle software; right?

A. That would be correct, yes.

Q. All right. Now, on top of that, he says in the next paragraph, "Dan found that they have also made license keys available for Siebel, PeopleSoft and JD Edwards software." "License keys" refers to keys that are necessary to -- in order to access certain software; correct?

A. Yes.

Q. Okay. And so without those keys for some of the Siebel, PeopleSoft, and JD Edwards software, you wouldn't have access to that; correct?

A. Yes.

Q. And he says, "Sounds to me like they just said" -- "they" refers to Oracle; right?

A. In this context, yes.

Q. All right. "'Help yourself to the buffet.'" The "buffet" refers to all of the software and keys that are available on eDelivery, the Oracle website; right?

A. Yes, it seems that Dennis Chiu was --

Q. All right?

A. -- referencing that, yes.

* * *

[303] Q. Now, you used -- your people used all of the software, PeopleSoft software, Oracle Database software, Siebel software, JDE software, you used that in connection with your work for customers; correct?

A. Yes.

Q. And the library, in addition to PeopleSoft and Siebel, also included JDE install media; correct?

A. I'm sorry. Can you say that again?

Q. Sure. We talked about the library having Siebel and PeopleSoft. It also included JD Edwards installation media; correct?

A. That's my understanding, yes.

MR. ISAACSON: All right. And let's go back to -- oh, let's look at 35 -- PTX 3511 at 4. This is a response to an interrogatory, interrogatory number 25. Do you have any objection to me showing it on the screen?

COURTROOM ADMINISTRATOR: It's not admitted.

MR. ISAACSON: It's not admitted.

COURTROOM ADMINISTRATOR: No.

MR. ISAACSON: Correct, it's not admitted. I'm asking if he has -- if I have his permission.

THE COURT: Oh.

MR. ISAACSON: Oh, please take -- I'm sorry, I didn't see it was on the screen yet.

THE WITNESS: I'm sorry. Which number is that?

* * *

[306] Oracle Database software; correct?

A. I see that in the document, yes.

Q. All right. You never disclosed that these libraries also had material for JD Edwards and Siebel; correct?

A. I don't see it listed in these particular name directories.

Q. In fact, you said under oath yesterday that the library did not include Siebel software; right?

A. I don't remember saying that.

Q. Well, "Did you have a library of Siebel software and documentation at Rimini Street? "No."

Do you remember saying that yesterday?

A. Again, you're talking about -- you were asking me about what the allegation was versus what I said the installation media --

Q. I just read you the complete question. "Did you have a library of Siebel software and documentation at Rimini Street?

"ANSWER: No."

Do you remember giving that testimony?

A. No, I don't remember it in that context, no.

Q. Okay. You did have a library of Siebel software and documentation; correct?

A. Based on the documents we reviewed and

* * *

[318] of 318 on the screen, and this --

THE COURT: The first page of 318 is admitted. (Plaintiffs' Exhibit 318, page 1 received into evidence.)

BY MR. ISAACSON:

Q. Mr. Chiu, again that vice-president in your company, this is March 2007, is responding to Mr. Whittenbarger.

He says, "Great question and I'm glad you asked.

"Our clients can extend their software licenses to us for testing and development purposes, much like they would extend them to a consultant they hire to perform development or testing -- exactly what our virtual environments are for and exactly what we do."

So at this point, Mr. Chiu was saying internally in the company that the Siebel licenses could be extended for testing and development purposes, and he was saying that to your environmental engineers; correct?

A. Yes, that's accurate.

Q. And he was saying that that's exactly what your Siebel environments were doing, testing and development; right?

A. That's what they were designed for, yes.

Q. And what we've been saying about separate silos and your golden rule about keeping things separately, you told that to customers also; right?

* * *

[320] A. I'd actually have to look at the numbers.

Q. Okay. In actuality, though, at Rimini you were using copies of customers' licensed Oracle software to serve multiple clients; right?

A. We were using the generic version of a release to serve as multiple clients that had the same, yes, the reuse.

Q. Okay. Let's talk about that, using the generic version of a release.

Now, a generic version of a release, you mean by Oracle software that requires a license; right?

A. Yes.

Q. Okay. And you would get that release from a customer and put it into a general testing and development environment; correct?

A. Yes. It was a general development test environment that originally sourced from some particular customer's media, yes.

Q. And you did that for PeopleSoft; correct?

A. Yes.

Q. You did that for Siebel; correct?

A. For a few environments. I think it was eight to ten, something like that, early years.

Q. And in the early years you also did that for JD Edwards; correct?

* * *

[335] A. That's what it says, yes.

Q. So what Mr. -- I believe it's Mr. Whittenbarger, and Mr. Slarve responds, he gives the Leads Customer Growth password; right?

A. Yes, that's what it says, that they -- apparently they decided not to use the Brandes and switched to another password for a customer who has live support.

Q. And Leads Customer Growth at this point wasn't even operating the Siebel software, were they?

A. No, but they were a licensee, and they did have support they had paid for.

Q. All right. So you are using the Leads Customer Growth password to access the Siebel support website and download all of those support materials so that you could hand them to multiple customers. That's correct, isn't it?

A. Yes.

Q. All right. And it's your understanding that if a customer's log-in credential is used to download materials that that customer was not licensed to, that would be improper; right?

A. Yes. But, again, coming back to -- specifically to the way the Siebel website worked in those early years, we had only one methodology to get that information.

Q. All right. And, for example, if we can look at 214.

COURTROOM ADMINISTRATOR: It's not admitted.

* * *

[350] Q. How many -- you don't know that for a fact? It's your first customer?

A. Well --

Q. You don't know for a fact whether that customer had zero-dollar value?

A. No. We billed them for services, they billed us for services. I don't know what that net was.

Q. The actual deal that was happening here, though, you agree with me on this, is that Rimini Street was in effect indirectly paying Leads Customer Growth to purchase Siebel software?

A. We were reimbursing them for the costs, uh-huh.

Q. Now, going back to 5355?

A. Uh-huh.

Q. Okay. Mr. Shay asks you should you wait for a bigger real customer, and one of the concerns you had about disclosing publicly LCG as a customer is that there was another company in the marketplace, TN, that's TomorrowNow; right?

A. Yes.

Q. Okay. And that's a company you know well because you were the former CEO of that company; right?

A. No, I was never the CEO.

Q. You were the former head of support for that company?

[351] A. No, I wasn't.

Q. Tell me your title with TomorrowNow.

A. I was president.

Q. President. Sorry.

And you were one of the founders of support at TomorrowNow?

A. Yes, for PeopleSoft and JD Edwards, yes.

Q. I'm sorry. You weren't one of the founders, you were the founder of support at TomorrowNow?

A. No, I actually had a partner, 50 percent, yes.

Q. All right. So you know folks at TomorrowNow, and so your concern -- and Mr. Shay is telling you

they're going to know that LCG is not a real customer?

A. Well, he's going to know that it's not IBM.

Q. Okay. That's not what Mr. Shay said; right?

They're going to actually know -- they're going to look up who this is. They're going to figure out this is not a real customer.

A. They're going to figure out, it's a very small company, that's for sure.

Q. Okay. The -- now, before the Siebel license was entered, you were the one actually acting as a business advisor to LCGrowth about those license terms; right?

A. I don't recollect exactly, but I assume so.

Q. Okay. And in terms of the marketing agreement that

* * *

[356] 2006, that LCG Growth had decided not to proceed with the implementation?

A. Yes, that's what it says in my email.

Q. All right. And after that, Rimini Street kept a copy of LCG's Siebel software on the Rimini systems; right?

A. According to whatever our decommissioning plan was, yes.

Q. And LCG -- Rimini used LCG's name then to attend -- to register as representatives of LCG at Oracle events; right?

A. I don't remember exactly, but it wouldn't be uncommon to use a customer's credentials to enter an event, yes.

Q. All right. And these are events where you get information about what Oracle's doing and to help you with your business and supporting software; right?

A. Yes. I mean, they're general events that customers are allowed to bring their support to, yes.

Q. And LCG Growth never used Rimini Street support, but it provided your first references; right?

A. Provided us references for being a great company and for being a worthy partner, yes.

Q. Okay. Let me get that straight.

So they recommended you as a great company and a worthy partner.

[357] This was a customer, a customer, who never used the Siebel software, who never got support for the Siebel software, and who you were paying to be a customer.

That was your first references who told other companies for you that you are a great -- a great company, and --

A. Great business partner.

Q. -- and a great partner. That's what happened?

A. Sure. Yeah.

Q. Okay.

A. I mean, that's the first customer. You do what you have to to get a first customer going.

Q. And what you had -- no, sir. You don't always do what you have to do. You can be honest about it, can't you?

You don't pay people to be your first customer and then have them go tell other people that you're a great company and a great partner and they're your customer?

A. Well, Oracle put out a piece as well.

MR. ISAACSON: Your Honor, my question is about this company.

THE COURT: The response will be stricken.

BY MR. ISAACSON:

Q. Okay. What you did was dishonest, sir, wasn't it? You paid someone to say they were your first

* * *

[359] MR. ISAACSON: Page 419.

COURTROOM ADMINISTRATOR: Thank you.

THE COURT: You may do so.

BY MR. ISAACSON:

Q. All right. Do you have page 419 in front of you, sir?

A. Yes, I do.

Q. You were asked the question,

"How much has Rimini Street paid Mr. Leake and his company from the inception of the relationship?

"ANSWER: I wouldn't know.

"QUESTION: Approximately?

"ANSWER: I wouldn't know.

"QUESTION: Is it more than $100,000?

"ANSWER: I wouldn't know.

"QUESTION: Is it more than a million dollars?

"ANSWER: I wouldn't know."

You said under oath that you didn't even know whether you paid him more than a million dollars; right?

A. No. I don't know.

Q. And those customers like Albridge who got references from LCG Growth, you never told them that you were paying this customer to be your first customer. You never told them that, did you?

A. That's your characterization, not mine.

* * *

[364] you sent other places?

A. Yes, on our own servers and our data center, yes.

Q. All right. And those -- the environments that you were using at Rimini were used in order to support customers; right?

A. That was their full design and purpose, yes.

Q. All right. And that included troubleshooting for customers?

A. Yes.

Q. Okay. And specifically for Siebel customers, you used Siebel environments for troubleshooting; correct?

A. That was their design, but I don't know actually how they were used day to day, yes.

Q. All right. Well, let's talk about the design first, and then we'll talk about the day to day.

Now, by, troubleshooting in layman's terms, that means that you have an environment that's separate from the operating system and so you can look at it and say why is the operating system having troubles, I'll look at this other copy of it and work with it and see if I can figure out what the trouble is over there.

Is that a fair summary?

A. Well, a little bit different.

Essentially, yes, you're taking the software, you're playing with it to see if you can figure out what's

* * *

[367] A. Yes, for this client, yes.

Q. Okay. And then -- so -- and what you were doing here with these troubleshooting environments is you were using one customer's environment to research or troubleshoot problems for different customers; right?

A. Well, as I said before, we would use a generic environment for a particular release of the product that other multiple customers would have the same license, yes.

Q. All right. And just to be clear, you would use the Siebel environment, if there's trouble, someone would play with it, maybe altering the system, maybe not, trying to figure out what the trouble is, and you would use that environment to check out troubles for a customer that had software of one

customer, and you would be doing that for a customer -- for a different customer.

I'm not sure that came out good?

A. Say that again, please.

Q. Sure. You had an environment for troubleshooting that had a customer's software on it, call it Customer A, and that would be used for troubleshooting, played around with, to see what troubles Customer B was having; right?

A. If they were on the same release and the same license, yes.

Q. Okay. And you also installed copies of the Siebel environment to learn about it, to evaluate it, to see how

* * *

[408] "As a backup strategy, I've asked Bola to install the vanilla Siebel 7.04 and Siebel 6.01 software on her laptop to better support Beekley and Galileo. Granted it's not working under the lab model, but we can then be in a better position to perform all the same work."

So what's happening here is one of your labs wasn't working, so you were having Ms. Bola install the software actually on her own laptops at this point; right?

A. That's what it looks like.

Q. Okay. And you indicated Mr. Leake is now working part-time, and on your website, one of my colleagues pointed out to me, that Mr. Leake "oversees all global digital marketing, marketing communications, client marketing, digital and rich media content creation, social media and media

analysis relations for Rimini Street. He leads all aspects of ideation and execution for marketing communications and digital media worldwide."

Is that accurate?

A. Not any more. That actually changed several months ago when he moved to part-time status and took a different role.

Q. But that was true up until a few months ago?

A. Yes, he was head of digital marketing, yes.

Q. Now, we talked a little bit about how you were the former president of TomorrowNow?

[409] A. Yes.

Q. And were you the 50 percent owner of TomorrowNow?

A. Yes, I owned 50 percent of the shares.

Q. And after you bought 50 percent of the TomorrowNow, you changed their business to provide third-party support? And by third-party support I mean support for enterprise software.

A. Yes. Independent maintenance, yes.

Q. All right. And you're the one who made the decision to change TomorrowNow's business model to compete with PeopleSoft for support; right?

A. Well, in conjunction with my business partners as we were 50-50 partners.

Q. Okay. But the business model was your idea?

A. Yes, based on my work at PeopleSoft and my understanding of what the industry opportunity was.

Q. And you said publicly that you had designed the TomorrowNow service; right?

A. Yes.

Q. And your responsibilities included designing TomorrowNow services offerings; right?

A. Yes. The actual services that we would provide customers, not the back end, how it gets delivered, yes.

Q. Well, but -- and you said what you would do is you would negotiate and sell TomorrowNow service, support [410] services, to customers?

A. Yes, I would sell the support contracts.

Q. All right. And Doug Baron, who is the Rimini employee we talked about is in charge of automated downloading, he was at TomorrowNow; right?

A. That's my understanding, yes.

Q. You've got at least 10 employees, former employees of TomorrowNow at Rimini Street; is that right?

A. I think it's more like 20 plus.

Q. And you have publicly said that Rimini's support model didn't change much from the model that you built at TomorrowNow; right?

A. Relating to what the core services were. We added many new services that weren't available at TomorrowNow.

Q. Okay. And, in fact, you have said publicly the - these are two companies you founded. You've said publicly their histories have run together and there's no way to separate those two companies.

A. Well, I use the example, I think, of Mr. Wynn who designed the Bellagio and then designed The Wynn, you see the same design elements, yes.

Q. Exactly. You've said that publicly before, and you've said that now.

TomorrowNow and Rimini Street, as you said, were like the Bellagio or the Wynn, they have their differences, [411] but when you walk in, it might have the same feel.

A. No, the new one is better always than the one before, yes. We added a whole bunch of new features, yes.

Q. All right. Yours was the more modern version.

The -- and the -- counsel called you, I think, a pioneer, in opening statement, and when your company has marketed you as a pioneer, you would include as part of that story your PeopleSoft, your TomorrowNow, and then your Rimini Street experience?

A. The pioneer, I believe, in the sense that we were creating this new idea of package services for these products, yes.

Q. Right. But when you -- when your marketing people call you a pioneer, or at least they used to, they were including TomorrowNow as part of that?

A. Certainly.

Q. Okay. Now, let me ask you to look at Plaintiffs'

Exhibit 30. You are familiar with this exhibit, aren't you, sir?

A. Yes, it looks familiar.

Q. Okay. Permission to put this on the screen. It's on the screen. It's been admitted.

At the top, you're writing in November 2007 to Pittsburgh public schools; right?

A. Yes. They became the client, yes.

* * *

[478] that TomorrowNow lawsuit was filed by Oracle?

A. Well, you're talking about a four year difference between the start of the company and I believe that lawsuit was starting with TomorrowNow.

Q. Correct. Let me put the question better.

After Oracle filed the suit against TomorrowNow, some of your customers asked have they threatened any lawsuit against you?

A. And the answer was no, we did not feel that there was a threat. Yes.

Q. Right. So, in fact, you said we -- you told, for example, customers such as Young who you talked to the jury about, we have never been threatened by Oracle for the work we do?

A. That's correct. There was no threat of litigation that had come our way, just a bunch of letters back and forth and sparing.

Q. All that happened was there was a bunch of letters, and you never felt any actual threat from Oracle. Is that right?

A. We're talking years and years of letters. So, no, it just seemed to be part of the landscape for us.

Q. Okay. We talked -- there's been talk in this case about automated downloading. Automated downloading are automated tools that Rimini has

employed over time to [479] download from Oracle's website; right?

A. Yes.

Q. And you used automated downloading tools with some of the first clients you signed?

A. We used it -- again, if you want to be more precise between Siebel, PeopleSoft, JD Edwards, they were different methodologies.

We started with Siebel product, then added PeopleSoft and JD Edwards a year later.

So, yes, each one of those had their own automated process for downloading.

Q. All right. And it was you who made the decision it was okay to log on to and download from Oracle websites using automated tools; right?

A. Yes.

Q. And you made the decision to approve the use of automated tools to download materials from Oracle's website?

A. Yes.

Q. All right. And you, in fact, sometimes as you passed screens, computer screens in the office, you could see employees running automated downloading tools on Oracle websites?

A. Yes, as I passed by, yes. I didn't do it myself.

Q. Okay. And some of the -- some of the automated [480] downloading was used -- was done with the user name Seth plus Ravin. Are you aware of that?

A. No, I heard about it in the litigation. I guess somebody used my name in downloading, yes.

Q. Okay. So -- and is it your testimony that you had no knowledge that your name was being used as a user name for this?

A. No, they would pick user names. I don't know why they picked my name.

Q. And then there came a time when you learned that Oracle had changed the terms of use for Customer Connection, the website that we talked about.

A. Yes, right after the TomorrowNow lawsuit was launched, yes.

Q. Well, your counsel said in opening statement that the terms of use were changed because of what Rimini Street was doing.

You would agree with me that the terms of use were changed because of what TomorrowNow was doing; correct?

A. I don't know for a fact why Oracle changed it. I just simply said they changed after the litigation began with TomorrowNow.

Q. Right. So while the statement was made that we -- that Oracle changed its terms of use in order to do [481] something to Rimini, the terms of use were changed right after the TomorrowNow lawsuit was filed; is that right?

A. Yes. I did get a letter back from Oracle relating to it, so I do have insight as to what Oracle said the reason was.

Q. All right. Let's look at Exhibit 20?

A. Okay. I'm there.

Q. This is an email from Mr. Chiu, and he says down below, "Seth left me a voicemail that he's reviewing and will get back to us."

And then what were you reviewing? We turn the page. On the next page, very small print, make that bigger.

"Oracle has updated their terms of use for Customer Connection, please reference the third paragraph in the introduction paragraph below."

So let's go to the next page and go to the third paragraph.

MR. ISAACSON: It's the third paragraph on the introduction, Matt.

THE WITNESS: Yes.

MR. ISAACSON: Make it bigger.

BY MR. ISAACSON:

Q. All right. And it says halfway through, "You will agree" – wait. No. Yes.

[482] "You agree that you will not access or use Customer Connection in any manner that could damage, disable, overburden, impair or otherwise result in unauthorized access to, or interference with, the proper functioning of any Oracle accounts, systems, or networks."

And then it says,

"For example, you may not use any software routines commonly known as robots, spiders, scrapers, or any other automated means, to access Customer Connection, or any other Oracle accounts, systems or networks."

Now, at the time these terms of use came into existence, you were using automated means to download material from Customer Connection; correct?

A. Yes.

Q. And after you learned of these terms of use, you continued to authorize automated downloading from Customer Connection; right?

A. Yes, I made the decision to continue to use the automated terms despite those changes.

Q. Right. And you knew it was against the rules that had been set forth in the terms of use, but, as you said, you continued to do it.

And you -- you also increased the amount of automated downloading, didn't you, using many -- several multiple -- several virtual machines at the same time using [483] software tools to download from Customer Connection; right?

A. Well, we had so many new customers coming over that, yes, we had set up multiple machines to do the download. So, yes, the volume would have naturally increased with the number of customers coming over.

Q. Right. And did you see the chart I showed in opening statement to track what was happening at one of the sites, and how your automatic search requests were higher than all the other requests by all the other Oracle customers combined?

That was you who authorized that; right? There it is. Thank you, Matt.

A. Yes. We had a lot of customers who were coming over to Rimini Street, and that was a lot of files they were entitled to.

Q. And the reason that you wanted these automated downloads is because manual downloads weren't going to get the job done for you; right?

A. Well, we actually switched to manual downloading. So we did switch that, yes.

Q. You weren't going to be able to run your business during this time period with manual downloading; right?

A. Well, that's what we thought, but when you switch to manual and once we figured out how to do it with larger volumes of people, yes.

[484] MR. ISAACSON: My question was about what was happening at the time so I would move to strike the answer about what comes later, Your Honor.

THE COURT: The answer is nonresponsive and will be stricken.

MR. ISAACSON: Would you please look at 454, PTX 454, which is preadmitted.

THE WITNESS: Yes, I'm at 454.

BY MR. ISAACSON:

Q. All right. And you're copied on this email in June 2007. It's about manual download time?

A. Yes.

Q. And if we go to the chart down at the bottom?

A. Yes.

Q. "Seth, this table helps identify how long it would take to manually download all updates and fixes a client is licensed for."

And then you have in the right column work days to complete download manually?

A. Yes.

Q. And you can see for each of these clients 53 days, 12 days, 81, 115. All of those days would be required if you shifted to manual downloading. That's why you were using the automated downloading; right?

A. Yes. It was going to be much more time consuming in [485] this terms of labor to do it manually.

Q. And, in fact, it's a little bit more than that, wasn't it?

MR. ISAACSON: Plaintiffs' Exhibit 21, which has been preadmitted.

BY MR. ISAACSON:

Q. If we can look at -- on page 3.

This is Mr. Lester talking to Mr. Shay, your cofounder. Mr. Shay is saying to Mr. Lester in point 4. He says in the middle,

"Essentially, with 96 to 112 labor hours required for the bare minimum basics, it would seem physically impracticable, if time cost-prohibitive to use manual methods to download 'all available and properly licensed fixes and updates' that a licensed client is legally entitled to receive."

Internally you were saying this wasn't just expensive, it was physically impractical and was cost prohibitive?

A. Yes, and that's why we didn't get everything for our client because, using a manual process, there's just no way to get everything. It's far too time consuming and costly.

Q. All right. And you gave at 27, Plaintiffs' Exhibit 27 -- Plaintiffs' Exhibit 27 is the direction from you. At the bottom, you're writing to Mr. Chiu in [486] July 5th, 2007.

You say, "Please use our automation tools to complete the downloads as it is not feasible to complete the entire downloads without such tools and processes."

You said it wasn't feasible to do this manually and so you directed that these automation tools be applied against the Oracle websites; right?

A. Yes. And at the time, because of where we were, we hadn't yet developed the manual process.

MR. ISAACSON: I would move to strike the back half of his answer after yes, Your Honor.

THE COURT: The motion will be granted and the jury will be instructed to disregard the nonresponsive portion of the answer.

BY MR. ISAACSON:

Q. All right. And Mr. Chiu responded, "we'll get the ball rolling right away," and you went forward with the automated downloading?

A. Yes.

MR. ISAACSON: So, Your Honor, at this point, I've got some left, not a great deal. I would benefit by a break for the afternoon if that's fine so that I can just organize the remaining materials and move through it efficiently.

From: CN=Thomas Shay/O=rsi
To: CN=Seth Ravin/O=rsi@rsi
Sent: 02/03/2006 12:36:56 AM
Subject: Re: RSI Support Agreement for LC Growth
Priority: 2

So is this support deal something we want to advertise? Or wait for a bigger real customer? I assume TN knows exactly who LCG is.
Seth Ravin
From: Seth Ravin
Sent: 02/02/2006 04:33 PM
To: Thomas Shay
Subject: Re: RSI Support Agreement for LC Growth
His license fees for their new system + required first year maintenance will come in around $1OK.
S
****
Seth A. Ravin
President & CEO
Rimini Street, Inc.
+ 1 (925) 699-0369
sravin@riministreet.com
www.riministreet.com
Thomas Shay
From: Thomas Shay
Sent: 02/02/2006 04:31 PM
To: Seth Ravin
Subject: Re: RSI Support Agreement for LC Growth
Ok
What was the final purchase from Siebel?
Seth Ravin
From: Seth Ravin
Sent: 02/02/2006 04:29 PM
To: Thomas Shay

Subject: RSI Support Agreement for LC Growth
Leake and I got the Support Agreement executed last night.
He is still waiting to close the Siebel deal - because we ran smack into the closing day legal doesn't know yet how to present and close deals...
****

Seth A. Ravin
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[492] UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BEFORE THE HONORABLE LARRY R. HICKS,
DISTRICT JUDGE

ORACLE USA, INC., a Colorado corporation; ORACLE AMERICA, INC., a Delaware corporation; and ORACLE INTERNATIONAL CORPORATION, a California corporation, Plaintiffs, vs. RIMINI STREET, INC., a Nevada corporation; and SETH RAVIN, an individual, Defendants.	No. 2:10-cv-0106-LRH-PAL

TRANSCRIPT OF JURY TRIAL - DAY 4

(Pages 492 through 740)

September 17, 2015 Las Vegas, Nevada

* * *

[541] to work with Oracle and had been turned aside in effect, and I think you've said something like that in your testimony?

A. Yes.

Q. All right. Now, in February 2009 --

MR. WEBB: I'm sorry, Your Honor, may we approach?

(Sidebar conference held as follows:)

MR. WEBB: There was a time when my client was subpoenaed to testify in connection with -- to be deposed in the SAP case. He refused, there was a subpoena, a motion to enforce the subpoena. He did ultimately appear for his deposition. I just want to make sure that's not where we're heading here.

MR. ISAACSON: I wasn't quite there yet, but, yes, I was going to get there.

And there's also the additional that his client agreed to accept a contempt finding in order to not answer questions that Oracle wants to ask -- wanted to ask.

They are arguing that they were offering to tell us what they were doing and that we are, you know, a bad company because we didn't come back and work with them.

And we subpoenaed him, asked him questions, he said no. He was ordered by a court to answer the questions, and he agreed to accept a contempt finding [542] rather than answer those questions immediately.

And so I think I'm allowed to say that given the position they're taking.

MR. WEBB: Being dragged into a case where he is not a party is not the same as offering to sit down and discuss his business within the context of letters.

MR. ISAACSON: I think it's very important if someone's willing to -- they're saying he's willing to say -- tell us what's going on, and what actually happened is he wouldn't do it under oath.

MR. WEBB: That's not at all what happened.

Judge, this is the same thing, he's trying to get to bring this SAP litigation into this case –

MR. ISAACSON: I'm not even going to mention the SAP litigation.

MR. WEBB: How --

THE COURT: Let me cut you off. I'm going to -- it's admissible in my view.

This directly concerns Seth Ravin and Oracle over issues that are comparable to what -- and included within what's involved here, and I think it's fair examination of an adverse witness, and I'll allow it.

And you can cross-examine in your cross-examination and provide the explanations that apparently are there. I don't know what the testimony will [543] be.

MR. WEBB: Okay. Thank you, Your Honor.

(Sidebar conference concluded.)

BY MR. ISAACSON:

Q. Mr. Ravin, in February 2009, there was a phone call between lawyers from Oracle and Rimini, and are you aware that Rimini lawyers told Oracle that you keep separate silos for every client and only did downloads for authorized work by clients?

A. I believe there was an affidavit filed by the lawyers about what took place on that call.

Q. Right. So there was a conversation between Oracle and Rimini, which Rimini represented, like you've represented to customers, that you keep separate silos for every client, and that you only do downloads for authorized work for clients, and you only do downloads relating to each client relative to their licensed products?

A. Yes, at the date of February 2009, yes.

Q. Now, after that, Oracle subpoenaed you to testify under oath; correct?

A. Yes, I was subpoenaed for a different case, yes.

Q. And you appeared for a deposition to testify under oath; correct?

A. Yes.

Q. And you declined to answer questions about what [544] Rimini Street was doing. You declined to do that under oath; correct?

A. Yes.

Q. And then a court ordered you to answer those questions; correct?

A. That is correct.

Q. And then you agreed to accept a finding that you were in contempt of court because you did not want to answer questions from Oracle about what Rimini Street was doing?

A. Well, again, I think it was a little more complicated than that.

Q. Well, let's find out if it was.

Am I not being precisely correct that after you -- after the court ordered you to answer those

questions, you agreed to be found in contempt of court rather than answering those questions?

A. It was a negotiation between us, Oracle, and the judge, yes.

Q. Right. And in that negotiation you agreed to be found in contempt of court?

A. Yes, in order for us to be able to file an appeal. That's how the process worked in the courts.

Q. And ultimately you did appear for deposition, and then Oracle filed this lawsuit. That's what happened [545] chronologically; correct?

A. Yes, actually over a period of time, yes.

Q. All right. One last topic.

The -- now, part of your business model is separating Oracle from its licensees and denying Oracle ongoing revenue; correct?

A. Fancy way of saying we compete, yes.

MR. ISAACSON: All right. Well, let me ask about the fancy way. Plaintiffs' Exhibit 3, I move to admit.

THE WITNESS: Yes, I'm there.

MR. WEBB: No objection, Your Honor.

THE COURT: It's admitted.

(Plaintiffs' Exhibit 3 received into evidence.)

BY MR. ISAACSON:

Q. Plaintiffs' Exhibit 3 is a document you sent to an investor with a hope that they would invest in your company in 2006, is that fair?

A. Yes.

Q. All right. And you say down in the strategic section where you're talking about your company,

"For investors who are direct competitors of Oracle, or who otherwise benefit from Oracle customer loss, Rimini separates Oracle from its acquired licensees denying

Brian Slepko /rsi
11/25/2008 11 :50 AM

To Dennis Chiu/rsi@rsi
cc
bcc
Subject Fw: Customer Communication SECOND NOTICE - XO Communications

FYI.

Brian J. Slepko
SVP, Global Operations
Rimini Street, Inc.
925-484-9010 (office)
925-699-7808 (cell)
925-369-7172 (fax)
bslepko@riministreet.com
www.riministreet.com
----- Forwarded by Brian Slepko/rsi on 11/25/2008 11:50 AM -----

Seth Ravin/rsi
11/25/2008 11 :30 AM

To Brian Slepko/rsi@RSI
cc
Subject Re: Customer Communication SECOND NOTICE - XO Communications

Got it...

****

Seth A. Ravin
President & CEO
Rimini Street, Inc.
+1 925.699.0369
sravin@riministreet.com

www.riministreet.com
Brian Slepko
---- Original Message ----
From: Brian Slepko
Sent: 11/25/2008 11:29 AM PST
To: Seth Ravin .
Subject: Re; Customer Communication SECOND NOTICE - XO Communications
But I'm not convinced that Oracle will let the process even from the XO site as I don't think it's a specific issue with us. Working on solutions...

Brian

Brian J. Slepko
SVP, Global Operations |
Rimini Street, Inc.
925-484-9010 (office)
925-699-7808 (cell)
925-369-7172 (fax)
bslepko@riministreet.com
www.riministreet.com
Seth Ravin/rsi

Seth Ravin/rsi
11/25/2008 11 :27 AM To Brian Slepko/rsi@RSI
cc
Subject Re: Customer Com
munication SEC-
OND NOTICE - XO
Communications

Thanks. We certainly can set up for them to finish from their site with our guidance if Oracle tries to push it that far...

S

****

Seth A. Ravin
President & CEO
Rimini Street, Inc.
+1 925.699.0369
sravin@riministreet.com
www.riministreet.com

Brian Slepko

----- Original Message -----
From: Brian Slepko
Sent: 11/25/2008 11:25 AM PST
To: Seth Ravin
Subject: Fw: Customer Communication SEC OND NOTICE - XO Communications

FYI. This just went out.

Suresh is pulling in his management and Den, Suresh, his management and me will get on the phone with Oracle to discuss approach. We have to have this meeting today or tomorrow.

No one from XO s making any noises about backing out of the contract but we do know that they will be very "uncomfortable" should we not get this done before their December 9 expiration date.

Will keep you posted on progress.
Brian

Brian J. Slepko
SVP, Global Operations
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----- Forwarded by Brian Slepko/rsi on 11/25/2008 11 :21 AM -----

Dennis Chiu /rsi
11/25/2008 11:18AM

To john.marandola@oracle.com
cc "Kumar, Ramana" <ramana.kumar@xo.com>, suresh.k.kamala@xo.com, Brian Slepko/rsi@RSI
Subject Fw: Customer Communication SECOND NOTICE - XO Communications

John,

Thanks for your time in discussing the need for our mutual client, XO Communications.

We are helping XO obtain all of the software and content that they are entitled to under their current support maintenance agreement. As a current Oracle (Siebel) customer, they require a complete library of all their entitled software for their current and future releases of Siebel. This has been requested in a separate service request and pending fulfillment (SR 3-823480151). In addition, they also require

their application license keys for their entitled software releases, which was also handled in another service request (SR 3-823170871). XO also requires the content they're entitled to from the knowledgebase portion of Metalink3. The online portion includes content that is not available in media format, and only available for download. This includes FAQs, Alerts, Tech Notes, online documentation, and searchable SRs from the knowledgebase portion of Metalink3. They also need the available patches that are available in the Patches and Downloads portion of Metalink3 for their current and future releases. Oracle currently has no fulfillment mechanism to provide all of the online pieces of the client's entitled content, which is why we've had to employ our methodology to assist them with the download mechanism for their entitled content. While Oracle clients can access all of the content under their current maintenance agreement, aside from manually downloading every distinct knowledge item, or patch, there isn't a simplified method to obtain all of their entitled content. As part of the services that XO Communications has contracted with Rimini Street, we are helping them obtain all of their content.

Because we are trying to complete all of the archive items for XO Communications ahead of a strict deadline within their support maintenance window, a manual methodology is not feasible. I understand our current methodology creates issues with CPU utilization on Oracle's servers, and as such, you've had to block any access from our IP addresses, which prevents us from fulfilling our obligation to XO Communications. And any further efforts will result

in further restriction of access from our IP addresses. That explains the question I raised in SR 3-823170871, requesting explanation of the blocked IP on Friday, Nov, 21, 2008, but the responses from the support agents was contradictory to the behavior we observed. I've copied the responses to SR: 3-823170871 below:

Therefore, we would appreciate your help to provide a solution with Oracle related to downloads not only for XO, but for our other client projects, as well. The intent is not to create undue burden on your servers, but to provide Oracle customers with a simpler mechanism to obtain all of the online content they are entitled to for their licensed products. Ideally, Oracle customers would welcome the option to have the content fulfilled upon request in a single fulfillment process.

Rimini Street provides support services for Oracle licensees, and requires Metalink3 access. Our access has been approved by each of our clients, granting access to Metalink3 as their authorized agents. I'd appreciate it if you could direct me to the appropriate contact who could provide us with the process which will allow us to complete the process of obtaining the entitled content for our mutual clients, without impacting performance on your servers, and are happy to work in parallel with your folks on a mutually agreeable method.

In any case, we do need Oracle to work with us to enable Oracle clients to take possession of the content they have the right to and use going forward. If Oracle customers can simply request fulfillment of

all that online content, and ensure that it's fulfilled, just like their software installation media, we wouldn't need to perform that task for them at all. We're under a very tight timeline for XO Communications, so I'd also like to suggest we get on a conference call with the client contact at XO to help provide any additional context ahead of their deadlines.

Thank you.
Dennis Chiu

"Mohamed Gommaa "
<mohamed.gommaa@oracle.com>
11 /25/2008 02:53 AM

To
<DChiu@riministreet.com>
cc
Subject RE: Update to SR #3-825501623: Cannot access ML3 - Page Times Out

Hi Dennis,

Regarding the IP blocking, I think that we couldn't block any IP to connect to our portals. I think that this is a security issue at your organization. From my side I can confirm that you can access the portal without problem from the running machines.

Best regards,
Mohamed
ORACLE

Mohamed Gommaa | Technical Support Engineer
Phone: +20235350228 | Mobile: +20 126356547
Oracle Oracle Global Customer Support - HUB
global_customer_support_w
w@oracle .com
11/24/2008 04:03 AM To <DChiu@riministreet.com>
cc
Subject Update to SR #3-825501623: Cannot access ML3 - Page Times Out

Dear Dennis,

You can clear your browser's cash and cookies in order to solve this problem. Also you can reset the browser's settings. Try to switch between browsers in order to solve this problem.

- For Internet Explorer browsers.
- Go to "Tools" -> " Internet Options."
- Under "General" tab in " Temporary Internet files" box.
- Click "Delete Cookies. .. " -> "OK".
- Click Delete Files. .. " -> select " Delete all offline content" -> "OK"
- Close all open IE browser windows.

- For Firefox browsers

  Go to "Tools" -> " Options"

  Go to "Privacy" tab .

  Under "Cookies" tab -> "Clear Cookies Now".

  Under "Cache" tab -> "Clear Cache now" -> "OK".

  Close all open Firefox windows.

For the latest version of Firefox

Open any fire fox page then press Ctrl+Shift+ Del then check all the boxes and last click on "clear all private data"

- For Netscape browsers

  Go to "Edit " -> "Preferences".

  Expand "Privacy & Security".

  Click "Cookies" -> "Cookie Manager " -> "Remove All Cookies" -> "OK" -> "Close".

  Expand "Advanced"

  Click "Cache" -> "Clear Cache" -> " OK".

  Close all open Netscape windows.

The supported browser versions are Netscape: Version 7.0 or higher or Internet Explorer: Version 5.5 or higher.

Please let me know that everything is OK.

Best regards,
Mohamed Gommaa
Mohamed.gommaa@oracle.com
Oracle Hub team-EMEA

John Whittenbarger/rsi

"Karnala, Suresh K" <suresh.k.karnala@xo.com>

From: John Marandola
[mailto:john.marandola@oracle.com]
Sent: Tuesday, November 25, 2008 6:20 AM
To: # SUP - LINX EM
Subject: FW: Customer Communication SECOND NOTICE - XO Communications

SECOND NOTICE:
The activity identified in the note below has not been corrected. Oracle is now seeing this activity from address 71.5.6.24. As indicated earlier, the activity is affecting Oracle's networks; if corrective actions are not taken promptly, Oracle may need to block the IP address or addresses from its network.

Please contact me at your earliest convenience at the EMAIL ADDRESS /PHONE NUMBER below to discuss resolution of this issue.

Thank you.

FIRST NOTICE:
Oracle USA, Inc. has detected improper activity on its web site. The details of that activity are included below. Our logs indicate that this activity originated from the IP Address 71.5.6.20. This activity is affecting the Oracle web sites and must be addressed.

Please review the information below and take immediate corrective action. If you believe that this message has been sent in error, or would like to review the situation with us, please contact me as soon as possible at the EMAIL ADDRESS / PHONE NUMBER below. Please note that, given the activity

and its effect on Oracle's networks, Oracle has been forced to block this IP address from its networks.
Source IP Address: 71.5.6.20
Destination Oracle IP Address: 141.145.54.12
User ID: linxem@xo .com

Failed: /u02/webapps/sureap/ivwork/ log/orion/LINXEM@XO.COM173_1227044829603 orion 5.1.DocumentData -E" EMAIL=LINXEM@XO .COM". -E "APPLICATION=METALINK" – E"ROLES=,Orion Customer, , , " -E"GUID=" - Daemon signalled an Error for (/u02/webapps/sureap/ ivwork/log/orion/LINXEM@XO COM173_1227044829603 orion 5.1. Document Data - E" EMAIL=LINXEM@XO.COM"-E" APPLICATION=METALINK" -E"ROLES=, Orion Customer, , ," -E"GUID=")

Thank you,

ORACLE
John Marandola | Manager, Vulnerability and Threat Management | VOIP: +1 650 607 7211 |Office: +1 203 703 4475
Oracle Risk Management
900 Long Ridge Road | Stamford, CT 06902
Oracle is committed to developing practices and products that help protect the environment

[741] UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BEFORE THE HONORABLE LARRY R. HICKS,
DISTRICT JUDGE

ORACLE USA, INC., a Colorado corporation; ORACLE AMERICA, INC., a Delaware corporation; and ORACLE INTERNATIONAL CORPORATION, a California corporation, Plaintiffs, vs. RIMINI STREET, INC., a Nevada corporation; and SETH RAVIN, an individual, Defendants.	No. 2:10-cv-0106-LRH-PAL

TRANSCRIPT OF JURY TRIAL - DAY 5

(Pages 741 through 889)

September 18, 2015

Las Vegas, Nevada

* * *

[758] can. We spend time after you leave in the afternoon and time in the morning before you're

supposed to start, and yet we still -- particularly in the early stages of a complex trial such as this one, things can take a little longer than anticipated.

But I can assure you that everyone's working while you're waiting, and we're working as fast as we can so that you're not delayed.

All of that stated, we're ready to go.

The record will show the jury is present. Counsel and parties are present.

And, Mr. Webb, you may go forward, please.

MR. WEBB: Thank you, your Honor.

SETH RAVIN

recalled as a witness on behalf of the Plaintiffs, having been previously sworn, was examined and testified as follows:

CROSS EXAMINATION RESUMED

BY MR. WEBB:

Q. Good morning, Mr. Ravin.

A. Good morning.

Q. Welcome back.

Prior to 2012, did Rimini Street have copies of Siebel software on its servers?

A. Yes.

[759] Q. And what were those copies used for?

A. Well, they're designed to -- according to the contracts, to, again, help us provide support to Siebel customers.

Q. Were they used for tax and regulatory updates?

A. No.

Q. So those Siebel copies that you had were not used for that part of the business where you see a change in the law and you modify the code?

A. No, because it's CRM software, so it's not a tax and regulatory product.

Q. Okay. So, again, what does CRM mean?

A. Client relationship management or customer relationship management.

Q. So remind the jury again why you wouldn't need tax and regulatory updates for that type of a product?

A. Well, that's primarily storing data about customers and prospects, so it doesn't -- there's nothing you're calculating. It's not like a paycheck.

Q. So when you're talking about the paycheck piece, the HR, we're talking about what product?

A. That would be payroll; payroll product.

Q. And would that be a PeopleSoft product?

A. Yes. Of these product lines, it would be PeopleSoft, yes.

[760] Q. Okay. Now, I want to turn the page and talk about JDE, JD Edwards. Again, remind the jury what that software product does.

A. Well, JD Edwards software was another brand of -- and they had payroll and human resources, just like the PeopleSoft side, and financials, manufacturing, all those same types of products.

Q. So prior to 2012, did Rimini Street have copies of JD Edwards software on its servers?

A. Yes.

Q. You're not denying that.

A. No.

Q. And what were those copies used for?

A. Those copies were, again, used for diagnostics and support.

Q. Were they used for archiving?

A. Were they used for --

Q. Archiving?

A. You mean in terms of creating archives? Yes, they would have been.

Q. Were they -- were they -- in terms of the copies of JD Edwards, were they on your servers or were they on the client servers?

A. Well, I -- we had some copies on our system.

Q. Now, when you're actually using the JD Edwards

* * *

[799] environments which are the customer and the local environments which are at Rimini.

Now, from 2006 to 2011, I believe it's your testimony that you had remote environments; correct?

A. Yes.

Q. You had general testing and development environments at Rimini?

A. Yes.

Q. And you created updates for one client and gave it to other clients you believed had the same license, and you did that from environments at Rimini?

A. Yes.

Q. And, specifically, one customer software environment at Rimini was used to development a fix or update that was ultimately delivered to a different customer; correct?

A. Yes.

Q. Now, in fact, when you had remote environments and environments at Rimini providing updates, your remote clients are not supported in a completely remote manner. You create updates centrally at Rimini, and then you deliver them to the remote environments; correct?

A. Yes.

Q. Now, about these remote environments. Would you look at PTX 495.

PTX 495 is dated April 11th, 2007. It's between [800] Ms. Lester and Mr. Davichick. So this is one of your executives talking to your head of sales; right?

A. Yes, that's true.

Q. All right. And if we go to page 2 -- all right. Well, let's actually start at page 3 so we understand the full context.

Beth Lester writes at the top,

"While it's still unclear to me where Moraine got the idea that remote development is one of our service options, I understand the need to make this

work and am committed to guiding the team through successful deliveries in this manner."

Then on the next page you reply to Beth Lester, right?

A. I'm sorry. Can you highlight the area?

Q. On page 2, you reply to Beth Lester?

A. Yes.

Q. Okay. And now, at this point, I think it was your testimony to your counsel that this -- whether you were going to go remote or on the Rimini environment, that was a client option, and you might urge them a little bit, but it was ultimately a client option.

Is that a summary of your testimony?

A. Yes.

Q. Okay. Now, what you wrote here to Beth Lester is [801] that -- at the top,

"The remote dev/test system option is neither ideal, pushed as preference, or to be promoted as a 'whatever you want to do' option to clients."

Okay?

You are instructing Beth Lester, and then your head of sales, that you are not to promote remote environments as a "whatever you want to do" option to clients; correct?

A. That's what it says, yes.

Q. Okay. And moving down to where it says, "This remote deal is NOT," in all capital letters?

Now, this is talking about this customer, Moraine, who is indicating an interest in remote, you say,

"This remote deal is NOT," all capital letters, "intended to be any kind of strategic change of model, but is a one-off project that we will try to minimize as a last resort for other client opportunities."

That was your business model, remote environments were a last resort, and that was the instruction to the sales team, correct?

A. Yes, that's what I wrote.

Q. Okay. And in terms of how you were going to go about doing this, let's move down to the next paragraph. In the middle, "Rich, Mike, and I."

[802] So Mike is Mike Davichick. Who is Rich? Who is Rich in this --

A. Oh, I'm sorry.

Q. "Rich, Mike and I." So that's Mike Davichick, you and --

A. Rich Hughes, which was a sales rep.

Q. So the three of you,

"Will look to convince them," Moraine, "that their license does not have these location restrictions and ultimately (hopefully) prevail on them for a change to our preferred model."

So you were telling customers, in order to convince them to bring their -- to bring the Oracle software onto the Rimini system, that there was no location restriction in the license; correct?

A. Related to Moraine Park, yes.

Q. Okay. The -- well, let's talk about that.

Well, actually, one thing before we do that.

Now, you have said -- you said yesterday, and you just said to me now, that you have -- that you take updates that you -- that you create at Rimini, and then you use those updates for other clients.

And that's what you said yesterday, is we reused those fixes and updates all the time. That was your testimony yesterday; right?

[803] A. I don't remember what I said all the time, but it was fairly frequent, yes.

Q. Okay. Well, the transcript says that your counsel asked this question.

"Taking an update that you created, your engineers created, and then using that update for other clients with the same version of contract or license, do you deny that you have done all that?

"No. We reused it all the time, yes."

You reused it all the time, right, the fixes and updates?

A. As needed and appropriate, yes.

Q. Now, sir, that is the first time that you have admitted that under oath, isn't it? You have previously denied that under oath.

A. No.

Q. Okay. At your deposition in 2010, do you recall that you denied that there was any use of software environments to develop a fix or update that was ultimately delivered to a different customer?

A. And I said no.

Q. That's right. Now, so in 2010, under oath, you were asked,

"Has it ever occurred that one customer's software environment has been used to develop a fix or [804] update that was ultimately delivered to a different customer?"

And, as you said, you said no.

Now, you're saying it happened all the time; right?

A. No.

Q. Okay. You just told me a few moments ago that you used one customer's software environment to develop a fix or update that was ultimately delivered to a different customer. You said that two minutes ago.

A. Right. We're talking about, again, the difference between the vanilla environments and custom environments.

MR. ISAACSON: All right. I'd like to play the deposition testimony so that the jury can see it, Your Honor. It's at the July 21st, 2010, deposition at 303, beginning at line 9.

THE COURT: You may do so.

(Videotape deposition of Seth Ravin played PAGE 303:09 TO 303:17 RUNNING 00:00:28.961)

"MR. HOWARD: Q. Does Rimini Street ever use software that was originally obtained from one customer to assist in supporting a different customer?

"A. No.

"Q. Has it ever occurred that one

[805] customer's software environment has been used to develop a fix or update that was ultimately delivered to a different customer?

(PAGE 303:19 TO 303:19 RUNNING 00:00:01.054)

"THE WITNESS: No."

BY MR. ISAACSON:

Q. All right. You didn't say it happened with customized environments and not vanilla environments or vice versa. You were asked, has it ever occurred, and under oath you said no.

And beginning yesterday, you said it happened all the time. That's what's going on here. Isn't it?

A. No.

Q. Now, two days ago, Wednesday, I asked you the question,

"At Rimini Street, were you using the environments of Client A to create fixes that you then distributed to Client B and C?"

And I asked Judge Hicks to instruct you to answer that question, and he asked me to repeat the question, and I did.

And in response to the question, "So at Rimini Street, you were using the environments of Client A to create fixes that you then distributed to Client B and C," you said no, the same thing you said in your deposition in [806] 2010.

Thursday, yesterday, in response to questions from your client, is the first time that you have disclosed and admitted that you were using fixes and

updates and creating them at Rimini and using them for other clients; right?

A. No. Again, if I'm permitted to answer in a wider way?

Q. I'll let your counsel do that with you.

Now, your counsel showed you a number of awards that your company has won and used that in opening statement, I believe.

Do you remember seeing that?

A. Actually, I don't remember the slide.

Q. The -- then let me move on to the license agreement. 3726. I spent some time on this with your counsel.

You and your counsel talked about this as the Brazoria license; right?

A. Yes, this looks to be -- yes, it looks to be.

Q. Right. It's the exact document that your counsel -- that you were testifying about with your counsel. You said this is the Brazoria agreement?

A. Yes.

Q. All right. So page 3, 14.2, I just want to point you to some language here. This has been shown in opening

* * *

[811] A. Yes, often.

Q. Okay. And if you look at 3726 in your book, it doesn't have the schedules, does it?

A. Not that I see in this document.

Q. Okay. This is -- 3726 is not a complete and correct copy of the contract, is it?

A. Yes. I don't know whether there's amendments, schedules, et cetera.

Q. Well, let's -- let's go find that schedule at Plaintiffs' Exhibit 23 which is in your book. We looked at this together before.

Plaintiffs' Exhibit 23 is where Brazoria County sent you their contract; correct?

A. Yes, appears to be.

Q. All right. And if we go to page 8 of 15, just at the top, you'll see here's the schedule. Right? Do you see that?

And then if we go to page schedule -- there's a couple pages, then we go to page 10 of 15, there's item 4, Designated Initial Software Support Sites.

That is -- when it says in the contract at the site in schedule 1, this is the site; right?

A. Yes, it appears to be.

Q. And the site is -- it says the Support Site, Associated Countries/Regions, Brazoria County, Texas; [812] correct?

A. Yes, that's what it says.

Q. Now, your testimony yesterday was that the interpretation of facility, the interpretation of this site restriction, based on your state of mind, based on your years of experience, that you always extended facilities to include beyond the customer's physical facilities to anyone who was doing service, and that you never contested that under your watch.

That was your testimony; right?

A. That's correct.

Q. So when the contract said -- let's go back to paragraph 1 of the --

MR. ISAACSON: And you can pick that up in this agreement, Matt, at page 4 of 15, section 1.1.

BY MR. ISAACSON:

Q. When it says, "On the servers located at the sites specified in the schedules," your state of mind in 2007, 2006, 2005, that that meant you could use the software outside of Texas, outside of Brazoria County, you could use it anywhere; right?

A. For our test and development systems, yes.

Q. All right. It says that the site is Brazoria County, Texas.

I mean, how hard is this? You're telling the [813] jury that you had a good faith belief standing in the shoes of the licensee that you were complying with the license agreement, and it said use this only in Brazoria County, Texas, and based on your years of experience and your state of mind, you said I can go anywhere with this?

A. Yes.

Q. And it didn't matter what the site restriction said, it didn't matter what state, what county, you would use it anywhere.

So if it said Georgia, you would use it in California. If it had said Texas, would you use it in California. It didn't matter, did it?

A. Actually, the answer is no.

Q. Okay. Well, in this case. With this Brazoria County contract that we're talking about, it said

Texas, and you thought it was okay to use it in California; correct?

A. Yes.

Q. Okay. Because that's where -- that's where you were remotely hosting this software -- not -- locally hosting this software?

A. Yes.

Q. Now, yesterday we looked -- not yesterday, but previously I had looked at PTX 30 with you, which is again in your binder, and we talked about this before. I'm just [814] giving this to you again so you have some context.

It's dated November 17th, 2007, and this was the document where you're talking about -- with one of the customers about the Pittsburgh -- the Pittsburgh public schools, about how TomorrowNow had decided, after being sued by Oracle, to no longer host copies of the client's test environments used by TomorrowNow to diagnose issues and build tax updates, and how you thought that decision was ridiculous, and you were going to continue to offer those environments on the Rimini system.

Do you remember that?

A. Yes.

MR. WEBB: I'm sorry, Your Honor, I don't mean to interrupt, Bill. Could we approach just for one second, Your Honor?

THE COURT: Actually, it's probably a good time to take our morning break. I will allow it. We'll discuss it as soon as the jury is excused.

Ladies and gentlemen, we'll take a fairly brief morning break. We will be breaking today at 11:30, or perhaps shortly before.

Same admonitions apply, and we'll be back in court just as soon as you're ready.

COURTROOM ADMINISTRATOR: Please rise.

(Jurors exit courtroom at 9:46 a.m.)

* * *

[819] information that you had now about copyright violations that -- what would you have done, and you said I would have gone all remote. Do you remember that?

A. Yes.

Q. It's a fact, isn't it, that in 2007 you knew that your former company, TomorrowNow, after having been accused of copyright infringement by Oracle, after -- the -- having their parent company admit wrongdoing and demoting the CEO, and after that company, TomorrowNow, shut down those local systems, that you said "that's ridiculous, we're not doing that."

A. Yes, that's what I said.

Q. Okay. You were never going to move away from your business model, were you?

You had information about copyright violations being alleged, you had information about what TomorrowNow was doing, but you still were moving forward; correct?

A. Yes, we did not change our business model.

Q. Okay. The other thing you did after this was, sometime in the next year, you started to edit your

biography online with Rimini Street and that you would give the customer, to remove your prior work experience with TomorrowNow, correct?

A. I don't remember that exactly. I think it did have it on there.

* * *

[823] A. Don't remember, sorry.

Q. Okay. Now, you said to your counsel yesterday -- he asked you this question.

"Certainly at one point Oracle said no more automated tools.

"ANSWER: Yes. They changed their terms of use for the website.

"How did you react to that?

"ANSWER: I was pretty surprised at the change for a number of reasons."

Do you remember that testimony?

A. Yes.

Q. Now, at your deposition, you were asked if you recalled reading Oracle's terms of use. Do you recall testifying that you didn't read that part, and, in fact, that you interpreted it as not prohibiting automated downloading?

A. I'm sorry. Could you rephrase for me?

Q. Do you recall saying at your deposition that you didn't read that part of the terms of use, and, in fact, you interpreted the changes as not precluding automatic downloading?

A. I'm sorry. I don't recollect.

MR. ISAACSON: Your Honor, I would like permission to show him his deposition from 11/17/11 [824] beginning at page 297, beginning at line 18.

THE COURT: You may do so.

COURTROOM ADMINISTRATOR: 11/17/11?

(Discussion held off the record.)

MR. ISAACSON: Yes. He tells me I'm reading the incorrect cite, but he's got the correct video.

THE COURT: Do we have the correct cite number? (Videotape deposition of Seth Ravin played PAGE 428:18 TO 429:06 RUNNING 00:00:37.296.)

"Q. And you, as we saw earlier, used LC Growth's login credential to download materials from the Oracle website?

"A. Well, again, from -- again, from the contract perspective we were authorized by the client, LC Growth. They had access and rights to the website because they had paid for support. And so we believe they acted fully within their license rights.

"Q. You would agree with me that LC Growth had no use for those materials because it had not, itself, implemented the software, right?

"A. Well, I won't say what LC Growth would or wouldn't have use for.")

BY MR. ISAACSON:

Q. Yesterday you told your counsel that you did see [825] that language, you did understand it as precluding automatic downloading, and you were surprised by that at the time and dismayed.

In your deposition under oath, you said that you didn't read it that way, and you didn't believe

automated downloading was precluded by that change.

Isn't that what's happened here?

A. Well, I did read and I did see that the -- that the words were in there, and per my deposition testimony, I did not change the way that we were doing downloading.

Q. But yesterday you told your counsel you knew that the changes prohibited automated downloading and that you were dismayed by that at the time.

And, in your deposition, you said, "I didn't interpret it that way." Correct?

A. Yes, that's correct.

MR. ISAACSON: All right. I have no further questions.

THE COURT: Recross-examination examination, Mr. Webb?

MR. WEBB: I just have a few minutes, Your Honor.

RECROSS-EXAMINATION

BY MR. WEBB:

Q. Mr. Ravin, earlier in Mr. Isaacson's [826] cross-examination, he referenced some deposition testimony about you saying that you didn't use one client's software for another client, something to that effect. Do you remember that?

A. Yes.

Q. And then he referenced my question to you yesterday, which I was able to pull up real quickly, and let me read you what I said.

I said, "What about this. Taking an update that you created, your engineers created, and then using that update for other clients with the same version of contract or license, do you deny that you all have done that?"

Your answer, "No, we reused it all the time, yes."

Do you remember that?

A. Yes.

Q. How can you square what you said in your deposition with what you said just yesterday in this court?

A. Well, exactly. I mean, I wasn't asked for the detail. No one asked me, just simply said did you do this, and the answer was no.

Because that was the base software. That was the vanilla code, not the individual, customized components relative to when we did development for customizations.

We did not give customers access to code that

[1083] UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BEFORE THE HONORABLE LARRY R. HICKS,
DISTRICT JUDGE

ORACLE USA, INC., a Colorado corporation; ORACLE AMERICA, INC., a Delaware corporation; and ORACLE INTERNATIONAL CORPORATION, a California corporation, Plaintiffs, vs. RIMINI STREET, INC., a Nevada corporation; and SETH RAVIN, an individual, Defendants.	No. 2:10-cv-0106-LRH-PAL

TRANSCRIPT OF JURY TRIAL - DAY 7

(Pages 1083 through 1353)

September 22, 2015

Las Vegas, Nevada

* * *

[1154] of Oracle software and support materials in total.

Q. Can you give the jury a sense for how much information that really means?

A. Yeah, that's always hard. You have to remember about a week ago Dr. Davis talked about how hard it is to kind of quantify in real-world terms how much a lot of digital information is.

In this particular case, the volume of digital data is approximately a couple times the size of the printed material, so all of the books in the Library of Congress, for example, which is millions and millions of books. It's a lot of data.

Q. We've talked about whether Rimini stored information in client-specific or nonclient-specific locations. Can you explain what it means to store something in a client-specific location as far as your analysis goes?

A. Yeah. So, if you look on the screen here, this is an example of some of the KDP data, and we rendered it here in a Windows Explorer interface so it's a little bit -- maybe a little bit more familiar.

But what you can see here is what Rimini Street calls -- an example of what Rimini Street calls a customer silo. So if you look towards the top, depending on your screens, it may be easier or harder to read, but

* * *

[1160] right? So you can't download a disk the same way you can't fax a piece of fish; right? You can only download the bits.

So it's not media in the first place. So in this particular case it's also not installation software, it's patches which are designed to modify software that has already been installed.

Q. The fourth item is Customer Connection. Can you explain what Rimini did there?

A. So Customer Connection was at one point Oracle's prime customer service website for PeopleSoft software, and Rimini Street downloaded a large number of software patches and pieces of documentation from Customer Connection and stored them in a noncustomer-specific way.

Q. The fifth category is Siebel SupportWeb.

Are you aware that Mr. Ravin testified earlier that Rimini was using the Leads Customer Growth password to access the Siebel support website and download all the support materials and hand them to multiple customers?

A. Yes, I am.

Q. Is that the same conclusion you reached after your own analysis?

A. Yes, we also concluded that.

Q. How many customers received copies of the Siebel SupportWeb extract?

[1161] A. So, in total, it was 18 that we saw evidence of. Albridge Solutions, AMICA Mutual Insurance Company, Brandes Investment Partners, Caterpillar, Doble Engineering Company, DST Health Solution Services, Electric Insurance Company, FileNet Corporation, or IBM, Galileo International, Industrial Scientific Corporation, Medical Protective, PepsiCo Shared Financial Services, Sam Houston Electricity Cooperative, Ubid Holdings, also known as Enable Holdings, USI - EDF Energy, Ventyx, Virginia Mobile USA, and Wenger Manufacturing.

Q. So we discussed those five categories of information that Rimini obtained in a nonclient-specific manner, and with regard to those five categories -- if you could put the slide back up, that would be helpful.

With regard to those five categories, was this information still on Rimini Street's systems at the time you got the list of files that were still there?

A. No. In -- for every one of these categories, Rimini Street had downloaded a significant amount of material from Oracle, stored it in a noncustomer-specific way, or used it in a noncustomer-specific way.

But then those materials -- at least for each of these categories, at least some of those materials were missing from Rimini's systems at the time the KDP data were generated in April of 2011.

Copyright Infringement - Direct Infringement

To prevail on its claim for direct copyright infringement as to the J.D. Edwards and Siebel software applications and related documentation and PeopleSoft documentation, Oracle International Corporation must prove the following by a preponderance of the evidence:

1. Oracle International Corporation is the owner or exclusive licensee of a valid copyright in an original work;

2. Rimini Street copied original elements from, created derivative works from, or distributed the original work; and

3. Rimini Street did not have permission to copy the original elements of the copyrighted work.

The parties have agreed that Oracle International Corporation owns or is the exclusive licensee of certain registered copyrighted works related to the J.D. Edwards and Siebel software applications and related documentation and PeopleSoft documentation at issue in this action, which means that Oracle International Corporation has proven the first element for these registered works.

The parties have also agreed, as stated in your juror notebook, that defendant Rimini Street copied the J.D. Edwards and Siebel software applications and related documentation as well as the PeopleSoft documentation at issue in this action. This means that Oracle International Corporation has also

proven the second element for these copyrighted works.

I inform you that Oracle International Corporation's claim for direct copyright infringement related to the PeopleSoft documentation is separate from, and not to be confused with, the PeopleSoft copyrighted software application which the court has previously ruled was infringed by Rimini Street as a matter of law.

It is up to you to determine whether defendant Rimini Street had an express license to copy these copyrighted works of J.D. Edwards and Siebel software applications and related documentation and PeopleSoft documentation . I will explain this issue in more detail in another instruction.

If you find that Rimini Street had an express license to make the copies that it did of J.D. Edwards and Siebel software applications and related documentation and PeopleSoft documentation, then you must find in favor of Rimini Street and against Oracle International Corporation on Oracle International Corporation's claim for direct copyright infringement. If, however, you find that Rimini Street did not have an express license to make the copies that it did of J.D. Edwards and Siebel software applications and related documentation and PeopleSoft documentation, you must find in favor of Oracle International Corporation and against Rimini Street on Oracle International Corporation's claim of direct copyright infringement.

JURY INSTRUCTION NO. 23

* * *

Copyright Infringement - Express License

Defendant Rimini Street asserts an express license defense to Oracle International Corporation's claim of direct copyright infringement.

Where a defendant asserts an express license defense to copyright infringement, the defendant has the initial burden to identify any license provision or provisions that it believes excuses the infringement. If a defendant satisfies this burden, then it becomes the plaintiff's burden to prove by a preponderance of the evidence that defendant's copying or other infringement was not authorized by the license provision or provisions.

In this action, Oracle enters into written software license agreements with its customers that allow the customers to use Oracle International Corporation's copyrighted software and have access to support materials for that software. It is undisputed that defendant Rimini Street did not have its own license with Oracle relevant to any of the issues that you are to decide. Instead, defendant Rimini Street asserts that its own client's software license agreements with Oracle authorized any copying Rimini Street engaged in as it relates to Oracle International Corporation's J.D. Edwards and Siebel software applications and related documentation and PeopleSoft documentation at issue in this action. Under the law defendant Rimini Street is permitted to assert those software license agreements as a defense.

It is up to you to determine whether defendant Rimini Street's copying of Oracle International Corporation's J.D. Edwards and Siebel software applications and related documentation and

PeopleSoft documentation was authorized by its client's software license agreements with Oracle. To help you in your deliberations, the court has previously interpreted the relevant licenses as a matter of law.

J.D. Edwards Software License Agreements

As to the J.D. Edwards software license agreements you are informed that the court has previously ruled as a matter of law that the J.D. Edwards software license agreements authorized a third party like Rimini Street - who was engaged by a licensee to provide support or other services - to copy the J.D. Edwards software application and related documentation onto its computer systems to the extent necessary for the customer's archival needs and to support the customer's use. An archival copy of the software application and documentation is an unmodified copy of the original software application and documentation for use in the event that production copy of the software - the copy used on a customer's systems - is corrupted or lost. This provision does not mean that a third party like Rimini Street is authorized to make copies of the J.D. Edwards software application and documentation to, among other things, access the software's source code to carry out development and testing of software updates, to make modifications to the software, or to use the customer's software or support materials to support other customers.

If you find that the copies of the J.D. Edwards software application and documentation housed on Rimini Street's servers were used solely for the customer's archival needs and to support the customer's use, then that use is authorized by the J.D. Edwards software license agreement and you

should find in favor of defendant Rimini Street and against Oracle International Corporation on Oracle International Corporation's claim for direct copyright infringement as it relates to the J.D. Edwards copyrighted works.

If, on the other hand, you find that the copies of the J.D. Edwards software application and documentation housed on Rimini Street's servers were used for purposes other than the customer's archival needs or to support the customer's use, then that use is outside the scope of the J.D. Edwards software license agreement and you should find in favor of Oracle International Corporation and against defendant Rimini Street on Oracle International Corporation's claim for direct copyright infringement as it relates to the J.D. Edwards copyrighted works.

Siebel Software License Agreements

As to the Siebel software license agreements you are informed that the court has ruled as a matter of law that the Siebel software license agreements authorized a third party like Rimini Street to make a reasonable number of copies of the Siebel software application and related documentation onto the third party's own computer systems solely for the customer's archive or emergency back-up purposes or disaster recovery and related testing. As stated previously, an archival copy of the software and documentation is an unmodified copy of the original software and documentation for use in the event that production copy of the software - the copy used on a customer's systems - is corrupted or lost. This provision does not mean that a third party like Rimini Street is authorized to make copies of the Siebel software and documentation to, among other

things, access the software's source code to carry out modification, development and testing of the software not related to archive, emergency back-up, or disaster recovery purposes, or to use the customer's software or support materials to support other customers.

If you find that the copies of the Siebel software application and related documentation housed on Rimini Street's servers were used solely for archive or emergency back-up purposes or disaster recovery and related testing then that use is authorized by the Siebel software license agreement and you should find in favor of defendant Rimini Street and against Oracle International Corporation on Oracle International Corporation's claim for direct copyright infringement as it relates to the Siebel copyrighted works.

If, on the other hand, you find that the copies of the Siebel software application and related documentation housed on Rimini Street's servers were used for purposes other than archive or emergency back-up purposes or disaster recovery and related testing then that use is outside the scope of the Siebel software license agreement and you should find in favor of Oracle International Corporation and against defendant Rimini Street on Oracle International Corporation's claim for direct copyright infringement as it relates to the Siebel copyrighted works.

PeopleSoft Software License Agreements

You have already been informed that the court has ruled as a matter of law the defendant Rimini Street engaged in copyright infringement of certain of Oracle International Corporation's PeopleSoft

software applications. However, the court has not ruled on the issue of copyright infringement as it relates to Oracle International Corporation's PeopleSoft documentation at issue in this action.

You are informed that the Court has previously ruled as a matter of law that defendant Rimini Street engaged in copyright infringement of Oracle International Corp. ation's PeopleSoft software applications. The PeopleSoft software licenses prohibited Rimini Street from copying or preparing derivative works from PeopleSoft software other than to support the specific licensee's own internal data processing operations on the licensee's own computer systems. Any copying or preparation of derivative works outside the scope of those limitations was prohibited by the license agreements. This means that the licenses prohibited Rimini Street from copying or preparing derivative works from PeopleSoft software on Rimini Street's computer systems. It also means the licenses prohibited Rimini Street from copying or preparing derivative works from PeopleSoft software in developing or testing software updates for other Rimini Street customers.

As to the PeopleSoft software license agreements you are informed that the court rules as a matter of law that the PeopleSoft software license agreements authorized a third party like Rimini Street to make a reasonable number of copies of the PeopleSoft documentation solely for the customer's internal use and at the customer's facilities. This provision does not authorize a third party like Rimini Street to copy, distribute, or use the PeopleSoft documentation at its facilities or to develop or test software updates for other customers.

If you find that the copies of the PeopleSoft documentation were solely at the customer's facilities and were used solely for the customer's internal use then that use is authorized by the PeopleSoft software license agreement and you should find in favor of defendant Rimini Street and against Oracle International Corporation on Oracle International Corporation's claim for direct copyright infringement as it relates to the PeopleSoft documentation and support materials.

If, on the other hand, you find that the copies of the PeopleSoft documentation were either at Rimini Street's facilities or were used for purposes other than solely for the customer's internal use then that use is outside the scope of the PeopleSoft software license agreement and you should find in favor of Oracle International Corporation and against defendant Rimini Street on Oracle International Corporation's claim for direct copyright infringement as it relates to the PeopleSoft documentation and support materials.

JURY INSTRUCTION NO. 24

* * *

Copyright Infringement - Damages - Innocent Infringement

An infringement is considered innocent when the Defendant has proved both of the following elements by a preponderance of the evidence:

1. the Defendant was not aware that its acts constituted infringement of the copyright; and

2. the Defendant had no reason to believe that its acts constituted an infringement of the copyright.

JURY INSTRUCTION NO. 35

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ORACLE USA, INC., a Colorado corporation; ORACLE AMERICA, INC., a Delaware corporation; and ORACLE INTERNATIONAL CORPORATION, a California corporation, Plaintiffs, v. RIMINI STREET, INC., a Nevada corporation; and SETH RAVIN, an individual, Defendants.	2:10-cv-0106-LRH-PAL VERDICT

Instructions: When answering the following questions and filling out this Verdict Form, please refer to the Jury Instructions for guidance on the law applicable to the subject matter covered by each question.

WE THE JURY, in the above-entitled case, unanimously find as follows:

INFRINGEMENT

Question 1: PeopleSoft Documentation

Has Oracle International Corporation proven by a preponderance of the evidence that Rimini Street engaged in copyright infringement by copying

copyrighted PeopleSoft documentation in a manner not authorized by the terms of the PeopleSoft software license agreements that the Court has explained to you?

✓ Yes ____ No

Question 2: J.D. Edwards Software and Documentation

Has Oracle International Corporation proven by a preponderance of the evidence that Rimini Street engaged in copyright infringement by copying copyrighted J.D. Edwards software and documentation in a manner not authorized by the terms of the J.D. Edwards software license agreements that the Court has explained to you?

✓ Yes ____ No

Question 3: Siebel Software and Documentation

Has Oracle International Corporation proven by a preponderance of the evidence that Rimini Street engaged in copyright infringement by copying copyrighted Siebel software and documentation in a manner not authorized by the terms of the Siebel software license agreements that the Court has explained to you?

✓ Yes ____ No

Question 4: Contributory Infringement

Has Oracle International Corporation proven by a preponderance of the evidence that defendant Seth Ravin engaged in contributory copyright infringement of the following Oracle International Corporation copyrighted works?

PeopleSoft Software	____Yes	✓ No
PeopleSoft Documentation	____Yes	✓ No
J.D. Edwards Software and Documentation	____Yes	✓ No
Siebel Software and Documentation	____Yes	✓ No
Oracle Database	____Yes	✓ No

Question 5: Vicarious Infringement

Has Oracle International Corporation proven by a preponderance of the evidence that defendant Seth Ravin engaged in vicarious copyright infringement of the following Oracle International Corporation copyrighted works?

PeopleSoft Software	____Yes	✓ No
PeopleSoft Documentation	____Yes	✓ No
J.D. Edwards Software and Documentation	____Yes	✓ No
Siebel Software and Documentation	____Yes	✓ No
Oracle Database	____Yes	✓ No

COPYRIGHT INFRINGEMENT DAMAGES

Question 6: Actual Damages

What do you find is the best measure of Oracle International Corporation's actual damages for all acts of copyright infringement engaged in by defendant Rimini Street?

Lost Profits ____

Fair Market Value License ✓

Regardless of whether you find that Lost Profits or a Fair Market Value License is the best measure of actual damages in this action, please answer all

three of the following questions concerning damages: Questions 6a, 6b, and 6c. Your answer to the damages question that you find is not the best measure of actual damages (either Lost Profits or a Fair Market Value License) is advisory to the court only.

Question 6a: Lost Profits

What amount of Lost Profits, if any, has Oracle International Corporation proven by a preponderance of the evidence for all acts of copyright infringement engaged in by defendant Rimini Street? If you found in Questions 1 through 3 that defendant Rimini Street did not engage in copyright infringement as to a particular copyrighted work, please do not consider that copyrighted work in your damages amount.

Total Lost Profits: $ 0

Question 6b: Defendant's Profits

What amount of Rimini Street's Profits, if any, has Oracle International Corporation proven by a preponderance of the evidence for all acts of copyright infringement engaged in by defendant Rimini Street? If you found in Questions 1 through 3 that defendant Rimini Street did not engage in copyright infringement as to a particular copyrighted work, please do not consider that copyrighted work in your damages amount.

Total Amount of Defendant's Profits: $ 0

Question 6c: Fair Market Value License

What amount do you find that Oracle International Corporation has proven by a preponderance of the evidence is the Fair Market

Value License for all of the infringed copyrighted works? If you found in Questions 1 through 3 that defendant Rimini Street did not engage in copyright infringement as to a particular copyrighted work, please do not consider that copyrighted work in your damages amount.

Total value of a Fair Market Value License: $ 35,600,000

Question 7: Contributory Infringement Damages

If you found that defendant Seth Ravin engaged in contributory copyright infringement, which portion of the actual damages award that you awarded against Rimini Street do you find that defendant Seth Ravin is contributorily liable for? The actual damages award that you should use for this question is whichever damages theory - either Lost Profits or a Fair Market Value License - that you determined is the best measure of actual damages.

Contributory Damages Amount: $ 0

Question 8: Vicarious Infringement Damages

If you found that defendant Seth Ravin engaged in vicarious copyright infringement, which portion of the actual damages award that you awarded against Rimini Street do you find that defendant Seth Ravin is vicariously liable for? The actual damages award that you should use for this question is whichever damages theory - either Lost Profits or a Fair Market Value License - that you determined is the best measure of actual damages.

Vicarious Damages Amount: $ 0

STATUTORY DAMAGES

Regardless of your verdict under the section Copyright Infringement Damages above, you must determine the amount of statutory damages under the Copyright Act. To determine the amount of statutory damages under the Copyright Act, please answer the following questions. Please note that in response to Questions 9 and 10, copyright infringement need not be innocent or willful, but can simply be infringement. Questions 9 and 10 reflect your finding as to special considerations for determining statutory damages under the Copyright Act. After deliberating, it may be that your answers to both Questions 9 and 10 are No. Such an answer is acceptable and contemplated under the Copyright Act.

Question 9: Innocent Infringement

Do you find that defendant Rimini Street has proven by a preponderance of the evidence that its infringement, if any, of the following copyrighted works was innocent as explained in the jury instruction titled Copyright Infringement - Damages - Innocent Infringement?

PeopleSoft Software	✓ Yes	___No
PeopleSoft Documentation	✓ Yes	___No
J.D. Edwards Software and Documentation	✓ Yes	___No
Siebel Software and Documentation	✓ Yes	___No
Oracle Database	✓ Yes	___No

If you found that defendant Rimini Street engaged in innocent infringement as to all of the copyright infringement that it engaged in, skip Question 10. However, if you found that defendant

Rimini Street did not engage in innocent infringement as to all of the copyright infringement that it engaged in, or that it engaged in innocent infringement as to only some of the copyright infringement that it engaged in, answer Question 10.

Question 10: Willful Infringement

Do you find that plaintiff Oracle International Corporation has proven by a preponderance of the evidence that defendant Rimini Street's infringement, if any, of the following copyrighted works was willful as explained in the jury instruction titled Copyright Infringement - Damages - Willful Infringement?

PeopleSoft Software	___Yes	✓ No
PeopleSoft Documentation	___Yes	✓ No
J.D. Edwards Software and Documentation	___Yes	✓ No
Siebel Software and Documentation	___Yes	✓ No
Oracle Database	___Yes	✓ No

Question 11: Statutory Damages

You must now determine the amount of statutory damages to award Oracle International Corporation under the Copyri ht Act. There are 100 copyright registrations listed in your juror book. The parties have agreed that no more than 93 copyrighted works are eligible for statutory damages.

You may award any amount between $200 and $150,000 for each copyrighted work infringed depending upon your findings regarding intent in the above questions. If you found that the infringement as to a particular copyrighted work was innocent in Question 9, then you may award between $200 and

$30,000 for each such copyrighted work. However, if you found that the infringement as to a particular copyrighted work was willful in Question 10, then you may award between $750 and $150,000 for each such copyrighted work.

The total number of copyrighted works for which statutory damages is awarded is: 93

The total amount to be awarded for statutory damages is: $ 2,790,000

Question 12: Contributory Infringement

If you found that defendant Seth Ravin engaged in contributory copyright infringement, what portion of the statutory damages award that you awarded against Rimini Street do you find that defendant Seth Ravin is contributorily liable for?

Contributory Statutory Damages Amount: $ 0

Question 13: Vicarious Infringement

If you found that defendant Seth Ravin engaged in vicarious copyright infringement, what portion of the statutory damages award that you awarded against Rimini Street do you find that defendant Seth Ravin is vicariously liable for?

Vicarious Statutory Damages Amount: $ 0

INDUCING BREACH OF CONTRACT/ INTENTIONAL INTERFERENCE

Question 14: Inducing Breach of Contract

Do you find that plaintiff Oracle America, Inc. has proven by a preponderance of the evidence that defendant Rimini Street and/or Seth Ravin induced

customers of Oracle America, Inc. to breach their contracts with Oracle America, Inc.?

Rimini Street	____ Yes	✓ No
Seth Ravin	____ Yes	✓ No

If you answered yes to either defendant, what amount of damages did that breach of contract cause to Oracle America, Inc.? If you did not answer yes to the above question as to a particular defendant please write N/A in the appropriate space provided.

Rimini Street	$ 0
Seth Ravin	$ 0

Question 15: Intentional Interference - Oracle America, Inc.

Do you find that plaintiff Oracle America, Inc. has proven by a preponderance of the evidence that defendant Rimini Street and/or Seth Ravin intentionally interfered with economic relationships between Oracle America, Inc. and customers that probably would have resulted in an economic benefit to Oracle America, Inc.?

Rimini Street	____ Yes	✓ No
Seth Ravin	____ Yes	✓ No

If you answered yes to either defendant what amount of damages did that intentional interference cause to Oracle America, Inc.? If you did not answer yes to the above question as to a particular defendant please write N/A in the appropriate space provided.

Rimini Street	$ 0
Seth Ravin	$ 0

Question 16: Intentional Interference - Oracle International Corporation

Do you find that plaintiff Oracle International Corporation has proven by a preponderance of the evidence that defendant Rimini Street and/or Seth Ravin intentionally interfered with economic relationships between Oracle International Corporation and customers that probably would have resulted in an economic benefit to Oracle International Corporation?

Rimini Street	____ Yes	✓ No
Seth Ravin	____ Yes	✓ No

If you answered yes to either defendant what amount of damages did that intentional interference cause to Oracle International Corporation? If you did not answer yes to the above question as to a particular defendant please write N/A in the appropriate space provided.

Rimini Street	$ 0
Seth Ravin	$ 0

COMPUTER ACCESS CLAIMS

Question 17: California Computer Data Access and Fraud Act - Oracle America, Inc.

Do you find that Oracle America, Inc. has proven by a preponderance of the evidence that defendant Rimini Street and/or Seth Ravin violated the California Computer Data Access and Fraud Act as explained in the jury instructions?

Rimini Street	✓ Yes	____ No
Seth Ravin	✓ Yes	____ No

If you answered yes to either defendant what amount of damages did that violation of the California Computer Data Access and Fraud Act cause to Oracle America, Inc.? If you did not answer yes to the above question as to a particular defendant please write N/A in the appropriate space provided.

Rimini Street	$ 8,827,000
Seth Ravin	$ 8,827,000

Question 18: California Computer Data Access and Fraud Act - Oracle International Corporation

Do you find that plaintiff Oracle International Corporation has proven by a preponderance of the evidence that defendant Rimini Street and/or Seth Ravin violated the California Computer Data Access and Fraud Act as explained in the jury instructions?

Rimini Street	✓ Yes	____ No
Seth Ravin	✓ Yes	____ No

If you answered yes to either defendant what amount of damages did that violation of the California Computer Data Access and Fraud Act cause to Oracle International Corporation? If you did not answer yes to the above question as to a particular defendant please write N/A in the appropriate space provided.

Rimini Street	$ 5,600,000
Seth Ravin	$ 5,600,000

Question 19: Nevada Computer Crimes Law - Oracle America, Inc.

Do you find that Oracle America, Inc. has proven by a preponderance of the evidence that defendant Rimini Street and/or Seth Ravin violated the Nevada Computer Crimes Law as explained in the jury instructions?

Rimini Street	✓ Yes	____ No
Seth Ravin	✓ Yes	____ No

If you answered yes to either defendant what amount of damages did that violation of the Nevada Computer Crimes Law cause to Oracle America, Inc.? If you did not answer yes to the above question as to a particular defendant please write N/A in the appropriate space provided.

Rimini Street	$ 8,827,000
Seth Ravin	$ 8,827,000

Question 20: Nevada Computer Crimes Law - Oracle International Corporation

Do you find that plaintiff Oracle International Corporation has proven by a preponderance of the evidence that defendant Rimini Street and/or Seth Ravin violated the Nevada Computer Crimes Law as explained in the jury instructions?

Rimini Street	✓ Yes	____ No
Seth Ravin	✓ Yes	____ No

If you answered yes to either defendant what amount of damages did that violation of the Nevada Computer Crimes Law cause to Oracle International Corporation? If you did not answer yes to the above

question as to a particular defendant please write N/A in the appropriate space provided.

Rimini Street	$ 5,600,000
Seth Ravin	$ 5,600,000

NON-DUPLICATIVE DAMAGES

Question 21: Non-Duplicative Damages - Oracle America, Inc.

If you found that Oracle America, Inc. suffered damages as a result of defendant Rimini Street and/or Seth Ravin's conduct you must now determine the total amount of damages that is not duplicative of any other damages award in your verdict as explained in the jury instruction titled Verdict Form - Duplicative Damages. In determining this amount, you should exclude the amount awarded for Statutory Damages as well as the amount awarded, if any, for whichever damages theory you determined was not the best measure of actual damages for copyright infringement (either Lost Profits or a Fair Market Value License). The total amount of non-duplicative damages to be awarded to Oracle America, Inc. against each defendant is as follows:

Rimini Street	$ 8,827,000
Seth Ravin	$ 8,827,000

Question 22: Non-Duplicative Damages - Oracle International Corporation

If you found that Oracle International Corporation suffered damages as a result of defendant Rimini Street and/or Seth Ravin's conduct you must now determine the total amount of damages that is not duplicative of any other damages award in your verdict as explained in the jury

instruction titled Verdict Form - Duplicative Damages. In determining this amount, you should exclude the amount awarded for Statutory Damages as well as the amount awarded, if any, for whichever damages theory you determined was not the best measure of actual damages for copyright infringement (either Lost Profits or a Fair Market Value License). The total amount of non-duplicative damages to be awarded to Oracle International Corporation against each defendant is as follows:

Rimini Street	$41,200,000
Seth Ravin	$5,600,000

PUNITIVE DAMAGES

If you found that Oracle America, Inc. and/or Oracle International Corporation has proven by a preponderance of the evidence that defendant Rimini Street is liable for intentional interference with prospective economic advantage (Questions 15 and 16), violating the California Computer Data Access and Fraud Act (Questions 17 and 18), or violating the Nevada Computer Crimes Law (Questions 19 and 20) please answer the following question.

Question 25: Punitive Damages - Rimini Street

Has Oracle America, Inc. and/or Oracle International Corporation proven by clear and convincing evidence that defendant Rimini Street engaged in malice, oppression, or fraud such that punitive damages against this defendant is warranted?

____ Yes ✓ No

If you found that Oracle America, Inc. and/or Oracle International Corporation has proven by a preponderance of the evidence that defendant Seth

Ravin is liable for intentional interference with prospective economic advantage (Questions 15 and 16), violating the California Computer Data Access and Fraud Act (Questions 17 and 18), or violating the Nevada Computer Crimes Law (Questions 19 and 20) please answer the following question.

Question 26: Punitive Damages – Seth Ravin

Has Oracle America, Inc. and/or Oracle International Corporation proven by clear and convincing evidence that defendant Seth Ravin engaged in malice, oppression, or fraud such that punitive damages against this defendant is warranted?

____ Yes ✓ No

You have now completed the Verdict Form. Have your foreperson date and sign the form below. Then, inform the court security officer that you have reached a unanimous verdict. Do not give the envelope to the bailiff. Your foreperson should retain possession of the Verdict Form until it is requested by the judge when the court reconvenes.

Dated this 13 day of October, 2015

_____

JURY FOREPERSON

EXHIBIT A

Attorneys' Fees	**Dkt. 996, Ex. 1**	**Adjustments**	**Final**
Bingham and Morgan Lewis	$18,695,129.67[1]		$18,695,129.67
Boies Schiller	$12,542,840.00[2]	*-$6,480.00*[3]	$12,536,360.00
H5 & Huron	$4,360,943.20[4]		$4,360,943.20
Other (Black Letter, Barg Coffin)	$28,895.12[5]		$28,895.12
TOTAL ATTORNEYS' FEES	$35,627,807.99		**$35,621,327.99**
Taxable Costs			

[1] Dkt. 923 ¶ 4; Dkt. 932 ¶¶ 7-8; Dkt. 937; Dkt. 939; Dkt. 972 ¶¶ 4-5.

[2] Dkt. 924 ¶ 4; Dkt. 933 ¶¶ 3-4; Dkt. 973 ¶¶ 3-5, Ex. 1.

[3] Hixson Decl. ¶ 4.d; Richardson Decl. ¶ 19.

[4] Dkt. 923 ¶¶ 97-98.

[5] Dkt. 923 ¶¶ 99-100.

Deposition Costs	$192,999.70[6]		$192,999.70
Stroz Fees for Oracle Productions	$4,757,561.00[7]	*-$1,515,279.45*[8]	$3,242,281.55
TOTAL TAXABLE COSTS	$4,950,560.70		**$3,435,281.25**
Non-Taxable Costs			
Stroz Electronic Discovery Costs	$8,271,552.59[9]	*$1,515,279.45*[10]	$9,786,832.04
Expert Fees (Davis, AACG, Nodruoy, TMF)	$3,353,191.75[11]	*-$7,931.25*[12]	$3,345,260.50

[6] Dkt. 923 ¶ 101.

[7] Dkt. 923 ¶ 110.

[8] Hixson Decl. ¶ 4.b.

[9] Dkt. 923 ¶ 110.

[10] Hixson Decl. ¶ 4.b.

[11] Dkt. 923 ¶¶ 104-108; Dkt. 932 ¶¶ 5-6, 10.

[12] Hixson Decl. ¶ 4.a DB3/ 200807992.2

Expert Fees (Elysium)	$4,466,899.61[13]	*-$815.00*[14]	$4,466,084.61
Other Consultant Fees (JRI)	$155,468.99[15]		$155,468.99
Other Consultant Fees	$159,369.10[16]		$159,369.10
Other Non-Taxable Costs	$585,485.44[17]		$585,485.44
Other Non-Taxable Costs	$644,788.20[18]	*-$1,409.20*[19]	$643,379.00
TOTAL NON-TAXABLE COSTS	$17,636,755.68		$19,141,879.68

[13] Dkt. 924 ¶¶ 44-45; Dkt. 933 ¶ 6; Dkt. 973 ¶ 18, Ex. 1.

[14] Hixson Decl. ¶ 4.c; Richardson Decl. ¶¶ 22-23.

[15] Dkt. 923 ¶ 103; Dkt. 932 ¶ 4.

[16] Dkt. 924 ¶ 46, Ex. 1; Dkt. 973 ¶ 19.

[17] Dkt. 923 ¶ 101; Dkt. 972 ¶¶ 4-5.

[18] Dkt. 924 ¶ 42; Dkt. 973 ¶¶ 4, 15, Ex. 1.

[19] Hixson Decl. ¶ 4.d; Richardson Decl. ¶ 21.

TOTAL ATTORNEYS' FEES AND COSTS SOUGHT	$58,215,124.37	*-$16,635.45*	**$58,198,488.92**

UNITED STATES DISTRICT COURT

**** DISTRICT OF NEVADA

ORACLE USA, INC., et al.,

Plaintiffs,

v.

RIMINI STREET, INC., et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2:10-cv-00106-LRH-PAL

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

___ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

X **Decision by Court.** This action came to be considered before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED an award of attorneys' fees and costs is hereby entered in favor of Plaintiffs Oracle USA, Inc.; Oracle America, Inc.; and Oracle International Corporation and against Defendants Rimini Street, Inc. and Seth Ravin in the amount of $46,227,363.36.

September 21, 2016 **LANCE S. WILSON**
Clerk

/s/ K. Walker
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ORACLE USA, INC., a Colorado corporation; ORACLE AMERICA, INC., a Delaware corporation; and ORACLE INTERNATIONAL CORPORATION, a California corporation, Plaintiffs, v. RIMINI STREET, INC., a Nevada corporation; and SETH RAVIN, an individual, Defendants.	2:10-cv-0106-LRH-PAL ORDER

Before the court are plaintiffs Oracle USA, Inc.; Oracle America, Inc.; and Oracle International Corporation's (collectively "Oracle") motion for a permanent injunction (ECF No. 900), motion for prejudgment interest (ECF No. 910), and motion for attorneys' fees (ECF No. 917). Defendants Rimini Street, Inc. ("Rimini") and Seth Ravin ("Ravin") (collectively "defendants") filed oppositions to the motions (ECF Nos. 905, 958, 998) to which Oracle replied (ECF Nos. 907, 979, 1018).

I. Facts and Procedural History

This action has an extensive factual and procedural history. In brief, Oracle develops,

manufactures, and licenses computer software. Oracle also provides software support services to customers who license its software. Defendant Rimini is a company that provides similar software support services to customers licensing Oracle's software and competes directly with Oracle to provide these services. Defendant Ravin is the owner and CEO of Rimini.

On January 25, 2010, Oracle filed a complaint for copyright infringement against defendants alleging that Rimini copied several of Oracle's copyright-protected software programs onto Rimini's own computer systems in order to provide software support services to its customers. ECF No. 1. In June 2011, Oracle filed a second amended complaint alleging thirteen causes of action against defendants: (1) copyright infringement; (2) violation of the Federal Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030(a); (3) violation of the California Computer Data Access and Fraud Act, Cal. Penal Code § 502; (4) violation of the Nevada Computer Crimes Law, NRS § 205.4765; (5) breach of contract; (6) inducement of breach of contract; (7) intentional interference with prospective economic advantage; (8) negligent interference with prospective economic advantage; (9) unfair competition; (10) trespass to chattels; (11) unjust enrichment; (12) unfair practices; and (13) accounting. ECF No. 146.

A jury trial was held on Oracle's claims from September 14 through October 13, 2015. On October 13, 2015, the jury returned its verdict and found that defendant Rimini engaged in copyright infringement of Oracle's copyrighted PeopleSoft, J.D. Edwards, and Siebel-branded Enterprise Software products. ECF No. 896. The jury also found that both

defendants Rimini and Ravin violated the California Computer Data Access and Fraud Act and the Nevada Computer Crimes Law. *Id.* Ultimately, the jury awarded Oracle $35,600,00.00 against Rimini for copyright infringement and awarded Oracle $14,427,000.00 against both Rimini and Ravin for violation of the state computer access statutes. *Id.* After the jury verdict, Oracle filed the present motions for a permanent injunction, prejudgment interest, and attorneys' fees. ECF Nos. 900, 910, 917. The court shall address each post-trial motion below.

II. Motion for Permanent Injunction (ECF No. 900)

As part of its motion for a permanent injunction, Oracle seeks three separate forms of relief. First, Oracle seeks judgment against defendants on its claim for violation of California's Unfair Competition Law. Second, Oracle seeks a permanent injunction to enjoin and restrain defendants from continued infringement of Oracle's copyrighted Enterprise Software products and from improperly accessing and taking data from Oracle's websites and computer systems. Finally, Oracle seeks disposition of all copies of the infringing software on defendants' systems.

A. California's Unfair Competition Law

Oracle seeks judgment against both defendants Rimini and Ravin on its claim for violation of California's Unfair Competition Law ("UCL"), Cal. Bus & Prof. Code § 17200 *et seq*. California's UCL prohibits unlawful, fraudulent, and unfair business practices. *Cel-Tech Comm's, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (Cal. 1992). There is no right to a jury trial under the UCL. Rather, a

violation of the UCL occurs as a matter of law when there has been a violation of a predicate act. CAL. BUS & PROF. CODE § 17200. A violation of the California Computer Data Access and Fraud Act is an identified predicate act under the UCL. *See Cal-Tech Comm's, Inc.*, 20 Cal. 4th at 180; CAL. BUS & PROF. CODE § 17500 *et seq*. Because the jury found that defendants violated the CDAFA, Oracle is also entitled to judgment against defendants on its UCL claim. Accordingly, the court shall grant Oracle's motion and issue judgment in favor of plaintiffs Oracle America, Inc. and Oracle International Corporation on this claim.

B. Permanent Injunction

"[T]he decision whether to grant or deny injunctive relief rests within the equitable discretion" of the district court. *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 394 (2006). Such discretion should be "exercised consistent with traditional principles of equity." *Id.* In determining whether to issue a permanent injunction in copyright infringement actions, courts evaluate four factors: (1) irreparable harm; (2) inadequacy of monetary damages; (3) the balance of hardships; and (4) whether the public interest would be served by a permanent injunction. *Id.* at 391; *see also Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 999 (9th Cir. 2011) (applying the four-factor test outlined in *eBay*). Further, an injunction should issue when the intervention of the court in equity is essential to protect a party's rights against injuries that could not otherwise be remedied. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

1. Availability of a Permanent Injunction

Before addressing whether to award Oracle an injunction in this action, the court must first determine whether Oracle is entitled to seek a permanent injunction against defendants and under what statute(s), if any.

Initially, Oracle contends that it may seek a permanent injunction under the Nevada Computer Crimes Law ("NCCL"). *See* NRS § 205.513(2) ("An injunction . . . [m]ay be issued without proof of actual damage sustained by any person."). However, under the NCCL, only the Nevada Attorney General or the appropriate district attorney may seek a permanent injunction against a party who has violated the act. NRS § 205.513(1) (stating that only the "Attorney General or the appropriate district attorney may file an action in any court of competent jurisdiction to prevent the occurrence or continuance of that act or practice."). Thus, the plain language of the statute does not authorize Oracle, a private party, to seek a permanent injunction for a violation of the NCCL.

Next, Oracle seeks a permanent injunction under the California Computer Data Access and Fraud Act ("CDAFA"). The CDAFA provides that the owner of a computer network, like Oracle, may seek injunctive relief for violations of the statute. CAL. PENAL CODE § 502(e)(1) ("In addition to any other civil remedy available, the owner or lessee of the computer, computer system, computer network, computer program, or data who suffers damage or loss by reason of a violation of any of the provisions of subdivision (c) may bring a civil action against the violator for compensatory damages and injunctive relief or other equitable relief."). Accordingly, Oracle

is entitled to seek a permanent injunction against defendants under the CDAFA.

Finally, Oracle contends that it is entitled to seek a permanent injunction under the Copyright Act. The Copyright Act provides that a district court may enter an injunction "on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." 17 U.S.C. § 502(a). Therefore, the court finds that Oracle is entitled to separately seek a permanent injunction against defendant Rimini under the Copyright Act.[1]

2. Irreparable Injury

The first factor in a permanent injunction analysis is whether a plaintiff has suffered an irreparable injury as a result of a defendant's conduct, or will suffer an irreparable injury absent an injunction. *See American Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). As part of a court's irreparable injury analysis in a copyright action, courts regularly examine three factors: (1) direct competition between the parties; (2) loss of market share due to the infringement; and (3) loss of customer and business goodwill. *See, e.g., Presidio Components Inc. v. Am. Tech. Ceramics Corp.*, 702 F.3d 1351, 1362 (Fed. Cir. 2012) (stating that direct competition in the same market strongly supports the potential for irreparable harm absent an injunction); *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 861 (Fed. Cir. 2010) (finding that harm to a

[1] As the jury did not find that defendant Ravin engaged in any copyright infringement, Oracle may not separately seek a permanent injunction against Ravin pursuant to the Copyright Act.

party's market share, revenues, and brand recognition is relevant for determining whether the party has suffered an irreparable injury); *Celsis in Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012) (holding that loss of goodwill, damage to reputation, and loss of business opportunities are all valid grounds for finding irreparable harm).

Here, the court finds that defendants' unlawful actions, to wit copyright infringement and violations of the state computer access statutes, irreparably injured Oracle's business reputation and goodwill. First, it is undisputed that Oracle and Rimini directly compete with each other to provide software support services and that Rimini infringed Oracle's copyrighted works, which supports issuance of a permanent injunction. *See Presidio Components, Inc.*, 702 F.3d at 1362.

Second, the evidence in this action established Rimini's callous disregard for Oracle's copyrights and computer systems when it engaged in the infringing conduct. For example, the evidence established that Rimini's egregious and continued infringement enabled it to rapidly build its business and gain market share against Oracle in the software support service market by offering cut-rate prices on its support services for Oracle software, generally at a discount of 50% of Oracle's prices for similar service contracts. In fact, Rimini's business model was built entirely on its infringement of Oracle's copyrighted software and its improper access and downloading of data from Oracle's website and computer systems, and Rimini would not have achieved its current market share and business growth without these infringing and illegal actions. Moreover, Rimini

landed clients for its services by telling customers that Oracle's services were overpriced and could be provided at the same rate Rimini was offering while still providing Oracle significant profits, thereby harming Oracle's business reputation. Through this misconduct, Rimini gained an improper advantage that it used to harm Oracle's business reputation and goodwill in the software service industry. Such injuries to a business' reputation and goodwill have consistently been held to constitute irreparable harm. *See Apple Inc. v. Psystar Corp. (Apple II)*, 658 F.3d 1150, 1154 (9th Cir. 2011).

Finally, Rimini's claim that it no longer engages in the conduct adjudged by the court and jury to infringe Oracle's copyrights is not a basis to deny issuance of an injunction. *See Metro-Goldwyn-Mayer Studios v. Grokster, Ltd.*, 518 F. Supp. 2d 1197, 1222 (C.D. Cal. 2007) (stating that "[a] private party's discontinuation of unlawful conduct does not make the dispute moot, however. An injunction remains appropriate to ensure that the misconduct does not recur as soon as the case ends."). Therefore, the court finds that this factor weighs in favor of a permanent injunction.

3. Inadequacy of Monetary Damages

In order to establish that an injunction is warranted, a plaintiff must show that monetary damages are inadequate to fully compensate it for the defendant's conduct. *eBay*, 547 U.S. at 391. Here, the court finds that Oracle has established that monetary damages alone are inadequate to compensate it for the losses suffered because of defendants. First, the court notes that certain harms suffered by Oracle like lost market share and company goodwill are intangible injuries difficult to

quantify and compensate. *See Apple II*, 658 F.3d at 1154 (stating that injuries to a business' reputation and company goodwill are intangible injuries difficult to quantify and compensate). Second, the infringement damages in this action were complex and difficult to determine. Unlike a patent case where a specific number of infringing products are sold at a specific price, in this copyright infringement action there was no efficient way to measure the damages Oracle suffered. In particular, the jury was provided with two separate damage theories, both of which required the jury to evaluate a substantial amount of evidence and expert testimony to reach the damages awarded in this action. Oracle's lost profits theory required the jury to determine the lost profits, if any, of a multi-billion dollar company that has a continuously growing business. Similarly, Oracle's hypothetical license damages theory required the jury to determine the amount Oracle would have charged for Rimini, its competitor in the software service market, to license its copyrighted software when presented with evidence that Oracle does not license its software to such competitors. The difficulty for the jury in determining damages in this action supports Oracle's claim that monetary damages alone are insufficient to fairly and fully compensate it for defendants' conduct. Finally, one of the most fundamental rights the holder of a copyright has is the right to exclude others, and this right has routinely been held difficult to compensate solely through monetary compensation. *See eBay*, 547 U.S. at 395 (Roberts, C.J. concurring) (identifying and explaining the difficulty of protecting a right to exclude through monetary remedies alone). Based on all the above, the court finds that this factor weighs in favor of an injunction.

4. Balance of Hardships

A court must weigh and balance the competing effect that granting or withholding an injunction would have on each party. *See Williams v. Bridgeport Music, Inc.*, 2015 U.S. Dist. LEXIS 97262, at *128 (C.D. Cal. 2015). The court has reviewed the documents and pleadings on file in this matter and finds that the balance of hardships weighs in favor of an injunction. Generally, the balance of hardships tips in favor of a holder of a copyright seeking to protect its copyrighted works, especially when the party to be enjoined does not have a separate legitimate business purpose for continuation of the infringing acts. *Grokster*, 518 F. Supp. 2d at 1220. This case is no different. First, Rimini does not have a separate legitimate business purpose for continuation of the infringing acts. Second, there is no evidence that Rimini would be harmed by an injunction that enjoins and restrains future copyright infringement or using the materials gained from its infringement because Rimini has already represented to the court that is has changed its business model and support services away from the infringing model in response to the court's orders on summary judgment. Finally, because Oracle seeks to enjoin only acts that have already been determined to be unlawful, the balance of hardships weighs in Oracle's favor.

5. Public Interest

"[T]he touchstone of the public interest factor is whether an injunction, both in scope and effect, strikes a workable balance between protecting the [copyright holder's] rights and protecting the public from the injunction's adverse effects." *i4i*, 598 F.3d at 863.

Here, having reviewed all the documents and pleadings on file in this matter, the court finds that an injunction against future copyright infringement and violations of the computer access statutes are in the public interest. *See Apple Comput. v. Franklin Comput. Corp.*, 714 F.2d 1240, 1255 (3d Cir. 1983) ("[I]t is virtually axiomatic that the public interest can only be served by upholding copyright protections and, correspondingly, preventing the misappropriation of the skills, creative energies, and resources which are invested in the protected work."). Further, an injunction against future infringement would not harm the public interest of access to competitive services because Rimini has repeatedly represented to the court that its current business model is not based on its prior infringing conduct. Taking defendants' statements as true, then Rimini's ability to compete against Oracle in the software support service market would not be lost with an injunction, and thus, the public would still have access to competition in that market. Finally, issuing an injunction in this action "ultimately serves the purpose of enriching the general public through access to creative works" by giving Oracle an incentive to continue to develop software for public use. *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1986 (2016). Therefore, the court finds that the relevant *eBay* factors favor issuance of a permanent injunction in this action, and the court shall grant Oracle's motion accordingly.

C. Disposition of Infringing Articles

In addition to a permanent injunction, Oracle seeks an order pursuant to the impoundment provisions of the Copyright Act either requiring defendants to turn over all infringing copies of

Oracle's copyrighted works to a neutral third party to be approved by the court or destroying all infringing copies outright, thereby preventing defendants from continuing to leverage the benefits of its infringing actions in its current business model. *See* ECF No. 900.

The Copyright Act provides that, "[a]s part of a final judgment or decree, the court may order the destruction or other reasonable disposition of all copies or phonorecords found to have been made or used in violation of the copyright owner's exclusive rights." 17 U.S.C. § 503(b). A disposition order is "an equitable remedy issued under the broad powers vested in a trial judge under 17 U.S.C. § 503(b)." *Rogers v. Koons*, 960 F.2d 301, 313 (2d Cir. 1992). However, such seizure and impoundment orders are "extraordinary relief" solely within the discretion of the district court. *See Williams*, 2015 U.S. Dist. LEXIS 97262, at *131. Although the Ninth Circuit has not identified appropriate factors to consider in determining whether to issue impoundment, several courts have applied the same factors related to issuance of a permanent injunction. *See, e.g., Hounddog Prods., L.L.C. v. Empire Film Grp., Inc.*, 826 F. Supp. 2d 619, 633 (S.D.N.Y. 2011); *Bridgeport Music, Inc. v. Justin Combs Pub.*, 507 F.3d 470, 492 (6th Cir. 2007) (affirming a district court's order of impoundment upon consideration of the traditional injunction factors).

With respect to Oracle's proposed disposition order, the court finds that Oracle is not entitled to a separate order impounding Rimini's computers and media. Generally, disposition orders should be granted only where other legal remedies and compensatory damages do not provide adequate

relief. Here, however, Oracle has received monetary compensation for Rimini's infringement, and the court has found that a permanent injunction should be issued against defendants against future conduct. These remedies are sufficient to protect and compensate Oracle. Further, the requested outcome of Oracle's disposition remedy - preclusion of Rimini from using the infringing works - is achieved the same with a permanent injunction as it would be with a disposition order. Thus, having already found that Oracle is entitled to a permanent injunction, the court shall deny Oracle's request for a separate disposition order under Section 503(b).

III. Motion for Prejudgment Interest (ECF No. 910)

Oracle also seeks an award of prejudgment interest on the jury verdict. Prejudgment interest is "statutorily prescribed interest accrued either from the date of the loss or from the date when the complaint was filed up to the date the final judgment is entered. . . . Depending on the statute, it may or may not be an element of damages." *Prejudgment interest, Black's Law Dictionary* (10th ed. 2014). The purpose behind prejudgment interest is "to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered." *Barnard v. Theobald*, 721 F.3d 1069, 1078 (9th Cir. 2013). Whether to award prejudgment interest under an applicable statute is in "the district court's sound discretion." *Id.*

Initially, Oracle seeks prejudgment interest under the Copyright Act on the jury's award of $35.6 million in damages against defendant Rimini for copyright infringement. *See* ECF No. 910. An award of prejudgment interest is an available statutory

remedy under the Copyright Act. *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 716 (9th Cir. 2004). In the Ninth Circuit, the starting point for federal prejudgment interest is the post-judgment rate established by 28 U.S.C. § 1961, which is the weekly average of the one-year constant maturity Treasury yield. *See Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 836-37 (9th Cir. 2012) (en banc), *see also Williams*, 2015 U.S. Dist. LEXIS 97262, at * 144.

In its motion, Oracle seeks prejudgment interest at the higher Prime rate rather than the Treasury rate, contending that the Prime rate is sufficient to cover inflation over the lengthy infringement and litigation period. *See* ECF No. 910. Further, Oracle argues that the hypothetical license measure of damages and the equities considered in a copyright case - compensation to the plaintiff, deterring infringers, and preventing unjust enrichment of the defendant - weigh strongly in favor of a market-based rate higher than the Section 1961 Treasury rate. The court disagrees.

"[U]nless the district court concludes that the equities demand a different rate," an award of prejudgment interest in a copyright infringement case "should be based on the fifty-two week Treasury bill rate." *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 886 F.2d 1545, 1552-53 (9th Cir. 1989). Further, the Ninth Circuit has repeatedly held that the Section 1961 rate is the appropriate rate of prejudgment interest in an action for copyright infringement. *Price*, 697 F.3d at 836; *Williams*, 2015 U.S. Dist. LEXIS 97262, at * 144. Here, the court finds that there is no basis to deviate from the standard Treasury rate to the Prime rate in this

action. That being said, however, the court finds that there is good cause to set the prejudgment interest rate at the Treasury rate on the date infringement began, rather than at the time of judgment. The court makes this finding because of the nature of the jury's award of hypothetical license damages. As the jury awarded damages to Oracle in an amount it would have received from Rimini for licensing Oracle's software at the time it began infringing Oracle's copyrights in late 2006, the court finds that this is the relevant time period for prejudgment interest. After this date, when Rimini began infringing Oracle's copyrights, Oracle lost out on the licensing fees it would have received, absent infringement. It is not equitable in the court's view to allow defendants to reap a windfall by the lower interest rates that are now available simply because they engaged in discovery delays and other litigation tactics (addressed more thoroughly in Oracle's motion for attorneys' fees) that kept this action in litigation for several years. Therefore, the court shall grant Oracle's motion and set the appropriate rate for prejudgment interest under the Copyright Act as the weekly average one-year constant maturity Treasury yield at the start of the infringement.

Second, Oracle also seeks prejudgment interest under the CDAFA and the NCCL on the jury's award of $14.4 million in damages for violation of the state computer access statutes. Under California law, "a person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in the person upon a particular day, is entitled to also recover interest from that day." CAL. CIV. CODE § 3287(a). However, under California law, only damages that are "certain, or capable of being made certain by

calculation" prior to litigation may accrue prejudgment interest. *Duale v. Mercedez-Benz USA, LLC*, 148 Cal. App. 4th 718, 728-29 (2007). The "test for recovery of prejudgment interest under § 3287(a) is whether [the] defendant actually knows the amount owed or from reasonably available information could the defendant have computed that amount." *Id.* Further, "where the amount of damage, as opposed to the determination of liability, depends upon a judicial determination based upon conflicting evidence" Section 3287 "does not authorize prejudgment interest." *Id.* Here, the amount of damages for defendants' conduct under the CDAFA was not known or easily calculable prior to trial and required the jury to evaluate and weigh conflicting evidence. Therefore, the court finds that Oracle is not entitled to prejudgment interest under the CDAFA.

In contrast, in Nevada, prejudgment interest is a matter of statutory right. *Torres v. Goodyear Tire & Rubber Co.*, 317 P.3d 828, 830 (Nev. 2014) ("NRS 17.130 . . . provides a statutory right for interest on judgments."). Nevada law establishes a prejudgment interest rate of 2% plus "the prime rate at the largest bank in Nevada ascertained by the Commissioner of Financial Institutions on January 1 or July 1, as the case may be, immediately preceding the date of judgment." NRS §17.130. Such interest is assessed as simple interest on an annual basis. *Torres*, 317 P.3d at 830-31. Further, under Nevada law, interest is drawn "from the time of service of the summons." *Sobel v. Hertz*, 291 F.R.D. 525, 544 (D. Nev. 2013). Here, the summons in this action was served on January 27, 2010. Thus, the court finds that Oracle is entitled to prejudgment interest at the Nevada statutory rate for the $14.4 million in damages for

violation of the NCCL starting January 27, 2010, through the date of judgment.

IV. Motion for Attorneys' Fees (ECF No. 917)

Oracle's last motion is its present motion for attorneys' fees and costs.[2] ECF No. 917. In its request, Oracle is seeking a total of $35,627,807.99 in attorneys' fees; $4,950,560.70 in taxable costs; and $17,636,755.68 in non-taxable costs for a total attorneys' fees and costs award of $58,215,124.37. The first issue before the court is whether to award attorneys' fees in this action. Then, if the court finds that such a fee award is appropriate, the court must determine the appropriate fees award.

A. Determination of Whether to Award Fees

Under Section 505 of the Copyright Act, the court has discretion to award a prevailing party costs and attorneys' fees. *See* 17 U.S.C. § 505 ("In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party . . . . [T]he court may also award a reasonable

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[2] Oracle's motion is accompanied by a breakdown of time spent by each contracted law firm, including the individuals who provided the work, what was being worked on, and the amount of time spent on that item as outlined in four separate declarations from Attorney Thomas S. Hixson, partner with the law firm Morgan, Lewis and Bockius LLP (ECF No. 918, Hixson Decl.); Attorney Kieran P. Ringgenberg, partner with Boies, Schiller & Flexner LLP (ECF No. 919, Ringgenberg Decl.); James C. Maroulis, Managing Counsel at Oracle (ECF No. 920, Maroulis Decl.); and Richard J. Pocker, also a partner with Boies, Schiller & Flexner LLP (ECF No. 921, Pocker Decl.). Oracle also filed a supplement to its motion for attorneys' fees and costs updating its request for fees to include time spent at trial and on post-trial motions. ECF No. 996.

attorney's fee to the prevailing part as part of the costs."). In order to determine whether an award of attorneys' fees and non-taxable costs are warranted under the Copyright Act, courts examine five factors: (1) the degree of success of the prevailing party; (2) the objective reasonableness of the losing party's arguments during litigation; (3) the need to make the prevailing party whole; (4) deterrence; and (5) the purposes of the Copyright Act. *See Kirtsaeng*, 136 S. Ct. at 1986; *McCulloch v. Albert E. Price, Inc.*, 823 F.2d 316, 323 (9th Cir. 1987); *Jackson v. Axton*, 25 F.3d 884, 890 (9th Cir. 1994) (stating the five factor test for attorneys' fees under the Copyright Act). Further, the Copyright Act does not condition an award of fees on a finding of willful infringement. *Casella v. Morris*, 820 F.2d 362, 366 (11th Cir. 1987) ("[A] showing of bad faith or frivolity is not a requirement of a grant of fees."). Rather, a court must evaluate each of the relevant factors and make a decision on "a more particularized, case-by-case assessment." *Kirtsaeng*, 136 S. Ct. at 1986. Each factor to determine whether an award of attorneys' fees is warranted is addressed below.

1. Degree of Success

Oracle argues that the degree of success it achieved on its claims warrants an award of attorneys' fees in this case. The court agrees. Oracle successfully defeated all of defendants' counterclaims, including counterclaims for copyright misuses, early in this litigation. Then, at trial, Oracle successfully prevailed on its claim for copyright infringement as the jury found that Rimini infringed every one of the 93 separate copyright registrations at issue. And important to the court is the fact that the trial was a copyright infringement

case first and foremost, regardless of all other claims pled. Oracle also prevailed on its two separate state computer access claims against both defendants. As a result of its overall success, Oracle won a $50 million verdict against defendants - including $35,600,000 for copyright infringement and $14,427,000 for the state computer access claims - which was five times the damages number presented at trial by defendants' damages expert. There is no question to the court that a $50 million verdict is a substantial success regardless of what could have been issued in this case. Therefore, this factor weighs in favor of awarding attorneys' fees.

2. Objective Reasonableness

The second factor is the objective reasonableness of the losing party's position during the litigation. *Kirtsaeng,* 136 S. Ct. at 1983. "No matter which side wins a case, the court must assess whether the other side's position was (un)reasonable." *Id.* at 1988. However, the objective reasonableness of a losing party's position "can be only an important factor in assessing fee applications - not the controlling one." *Id.* at 1988. "That means in any given case a court may award fees even though the losing party offered reasonable arguments (or, conversely, deny fees even though the losing party made unreasonable ones)." *Id.* "For example, a court may order fee-shifting because of a party's litigation misconduct, whatever the reasonableness of his claims or defenses." *Id.* at 1988-89 (citing *Viva Video, Inc. v. Cabrera*, 9 Fed. Appx. 77, 80 (2nd Cir. 2001)). "Or a court may do so to deter repeated instances of copyright infringement or over aggressive assertions of copyright claims, again even if the losing position was reasonable in a particular case." *Id.* at 1989 (citing *Bridgeport Music,*

Inc. v. WB Music Corp., 520 F.3d 588, 593-95 (6th Cir. 2008) (awarding fees against a copyright holder who filed hundreds of suits on an overbroad legal theory, including in a subset of cases in which it was objectively reasonable)).

Here, the court finds that defendants' litigation position that it did not engage in copyright infringement was not an objectively reasonable position. Rather, it was based on a clear misreading of Oracle's software licensing agreements and a conscious disregard for the manner that Rimini used and housed Oracle's copyrighted software programs on its own servers. In fact, Rimini's position was so unreasonable that the court was able, at summary judgment, to determine that Rimini engaged in massive copyright infringement of Oracle's copyrighted works, thereby leaving only a few issues for trial. However, throughout this litigation, including right up until trial, Rimini contended that no copyright infringement ever occurred because it did not use the copyrighted software in a proscribed manner. Based on defendants' conduct, the court finds that their position was not reasonable.

Further, even if defendants' litigation position was reasonable, the court finds that attorneys' fees are still warranted in this action because of Rimini's repeated instances of copyright infringement and its significant litigation misconduct in this action. *See Id.* It is undisputed that defendants ignored their preservation obligations and destroyed evidence prior to trial, including a key computer directory containing Oracle software that Rimini used for multiple customers in violation of customer licenses. In fact, Magistrate Judge Leen found that defendants intentionally deleted the software library

well after they were on notice of potential litigation and were well aware that the software library was potentially relevant evidence. As a result of their litigation misconduct, defendants were forced to acknowledge the spoliation and destruction of evidence at trial, and the court even gave an adverse inference jury instruction about the issue. Therefore, taking all of the above into consideration, the court finds that this factor weighs in Oracle's favor.

3. The Need to make Oracle Whole

The third factor in determining whether to award attorneys' fees under the Copyright Act is the need to make the prevailing party whole. *See McCulloch*, 823 F.2d at 323 ("[S]ection 505 is intended in part to encourage the assertion of colorable copyright claims . . . and to make the plaintiffs whole.").

In its motion, Oracle argues that an award of attorneys' fees is necessary to compensate it for its huge outlay of fees and costs necessarily incurred in enforcing its copyrights. The court agrees. Oracle has spent decades developing its copyrighted software only to have the defendants take that hard work and use it to their benefit at Oracle's expense. In order to prosecute this action, Oracle was compelled to spend a significant amount of resources in legal fees and costs over what was eventually awarded in damages just to stop defendants' unlawful conduct. Without a fee award, the court finds that Oracle's investment in its intellectual property and its incentive to create future software would not be appropriately protected or compensated.

4. Deterrence

The fourth factor in a court's attorneys' fee analysis is the need to deter defendants and others from engaging in future infringement. *McCulloch*, 823 F.2d at 323. Here, the court finds that an award of attorneys' fees is appropriate to deter defendant Rimini from its pattern of infringing Oracle's copyrights, which started when the business began and continued until the middle of this litigation. Further, an award of fees is necessary to deter other third party service providers from engaging in similar infringing conduct in order to compete with Oracle for software support services.

5. Purpose of the Copyright Act

The last factor in a court's analysis of whether to an award attorneys' fees is whether an award will further the purposes of the Copyright Act. *See Mattel, Inc. v. MGA Entm't, Inc.*, 705 F.3d 1108, 1111 (9th Cir. 2012) ("The most important factor in determining whether to award fees under the Copyright Act, is whether an award will further the purposes of the Act.").

The court finds that awarding attorneys' fees in this action furthers the purposes of the Copyright Act as it rewards owners of intellectual property, like Oracle, for pursuing their rights under the act and "encouraging and rewarding authors' creations." *Kirtsaeng*, 136 S. Ct. at 1986. Further, as discussed above, an award of attorneys' fees would deter future infringement. As such, the court finds that a fee award is appropriate in this action. *See id.* ("[F]ee awards under § 505 should encourage the type of lawsuits that promote [the purposes of the Copyright Act].."). Accordingly, the court shall grant Oracle's

motion and issue an award of attorneys' fees under the Copyright Act.[3]

B. Amount of Fees

If a district court determines that an award of attorneys' fees is warranted under the Copyright Act (or other statutory provision), the court must determine the amount of reasonable fees to award the prevailing party. In its motion, Oracle argues that the court should award $35,627,807.99 in attorneys' fees to compensate it for the fees it incurred to prosecute this litigation. In determining the reasonableness of an award of attorneys' fees, a district court considers several non-exclusive factors, including: (1) the reputation and skill of counsel; (2) the financial terms of the client fee arrangement;[4] (3) the nature and extent of work performed and results

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[3] An award of attorneys' fees is also available under both the CDAFA and the NCCL. See CAL. PENAL CODE § 502(e)(2) ("In any action brought pursuant to this subdivision the court may award reasonable attorney's fees."); NEV. REV. STAT. § 205.4765 ("Any victim of a crime described in NRS 205.473 to 205.513, inclusive, may bring a civil action to recover . . . [c]osts and reasonable attorney's fees incurred in bringing the civil action."). Insofar as the court has found that Oracle is entitled to attorneys' fees under the Copyright Act, the court also finds that attorneys' fees are warranted under the CDAFA and the NCCL, both of which allow attorneys' fees under factors less stringent than the Copyright Act. Further, in contrast to an award of fees under the Copyright Act, for which defendant Ravin was not found liable, the court finds that an award of fees under both the CDAFA and the NCCL may be levied against both defendants severally and equally.

[4] Here it is undisputed that Oracle's fee arrangements with counsel were hourly rate contracts for work performed in this action and were not contingency fee agreements.

obtained; and (4) awards in similar cases. *See* LR 54-16(b)(3); *Resurrection Bay Conservation All. v. City of Seward Alaska*, 640 F. 3d 1087, 1095 (9th Cir. 2011).

Initially, in determining the amount of fees to award in an action, the court must look to the reasonableness of the rates charged by counsel. *Id.* Generally, courts determine a reasonable rate for attorneys' fees based upon "the rates prevailing in that district for similar services by lawyers of reasonably comparable skill, experience and reputation," irrespective of practice area. *Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 445 (9th Cir. 2010). However, "the district court may, if circumstances warrant, adjust the lodestar to account for other factors which are not subsumed within it." *Ferland v. Conrad Credit Corp.*, 224 F.3d 1145, 1149 n.4 (9th Cir. 2001). Those additional non-exclusive factors include: "(1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the 'undesirability' of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases." *Ballen v. City of Redmond*, 466 F.3d 736, 746 (9th Cir. 2006).

Here, the court finds that the appropriate rates for counsel in this copyright infringement action are the actual rates charged by counsel. "Unless counsel is working outside his or her normal area of practice,

evidence that a billing rate was the usual rate the attorney charges for his or her services is evidence that the rate is comparable to the market rate." *Perfect 10, Inc. v. Giganews, Inc.*, No. 11-07098, 2015 WL 1746484, at *5 (C.D. Cal. Mar. 25, 2015). Further, in an action under the Copyright Act, an award based on the actual rates charged by counsel has consistently been held to be reasonable under 17 U.S.C. § 505. *See, e.g., Kourtis v. Cameron*, 358 Fed. App'x. 863, 868 (9th Cir. 2009). This is because in such complex litigation "the parties can reasonably be expected to retain nationally respected law firms and nationally respected attorneys to pursue their interest in the litigation," which will result in "higher lodestars than normally seen in this district." *Pacquiao v. Mayweather*, 2012 WL 4092684, at *2 (D. Nev. 2012) (finding actual rates paid to California attorneys were "reasonable" and awarding them). As such, the court finds that the actual rates Oracle paid its attorneys - as established in the several declarations attached in support of Oracle's motion - are reasonable rates for this action.

Additionally, the reasonableness of the rates charged in this action is confirmed by both parties' decisions to hire national law firms. Their decisions to hire national firms reflects that the market for legal services for copyright infringement is a national market and that both parties believed only nationally-renowned firms that charged above market rates for this district could handle their cases. Therefore, the court finds that the actual rates charged by counsel in this action are reasonable rates.

Now, the issue turns to whether the amount of time billed in this case was reasonable. "[T]o

determine whether attorneys for the prevailing party could have reasonably billed the hours they claim to their private clients, the district court should begin with the billing records the prevailing party has submitted." *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1202 (9th Cir. 2013). In its motion, Oracle argues that its billing records reflect a reasonable amount of time spent on this complex litigation, and that it has made conservative adjustments to the hours actually spent by counsel prior to submitting the records.

The court has reviewed Oracle's billing records and finds that Oracle has proffered sufficient evidence for the court to find that most of the time billed by counsel was reasonable for such complex litigation. However, as identified in detail by defendants' objections to evidence submitted in support of Oracle's motion,[5] Oracle's billing records do include some inconsistencies that violate regular billing practices and guidelines, such as improper block billing entries, though the court does not find Oracle's billing records nearly as "replete" with errors as defendants contend. *See, e.g., Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir. 2007) ("[B]lock billing makes it more difficult to determine how much time was spent on particular activities.").

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[5] Along with its opposition, defendants filed two separate objections to evidence submitted in support of Oracle's motion for attorneys' fees. ECF Nos. 1005, 1031. Unless and except as specified in the court's order, the court finds that the evidentiary objections are without merit or go to the weight the court should give the evidence in determining an award of attorneys' fees, rather than the admissibility of the evidence before the court.

Rather than identify every instance of a mathematical error, block billing, or missing invoice, the court finds that a blanket reduction of the requested fees in the amount of 20% is appropriate and consistent with other attorneys' fee awards under similar situations. *See, e.g.*, *Huhmann v. FedEx Corp.*, 2015 WL 6127198, at *8 (S.D. Cal. Oct. 16, 2015) (30% reduction for improper billing entries); *eMove, Inc. v. SMD Software, Inc.*, 2012 WL 4856276, at *7 (D. Ariz. Oct. 11, 2012) (20% reduction for improper billing entries); *Gunderson v. Mauna Kea Prop., Inc.*, 2011 WL 9754085, at *10 (D. Haw. May 9, 2011) (20% reduction for improper billing entries). Therefore, reducing Oracle's request for fees by 20%, Oracle is entitled to recover $28,502,246.40 in attorneys' fees incurred in this action.[6]

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[6] Defendants argue that any fee award must be further reduced because Oracle did not achieve a result greater than their pre-trial Rule 68 offers. *See Lantz v. Kreider*, 2010 WL 2609080, at *5 (D. Nev. 2010) ("The proper course of action with respect to the unaccepted Rule 68 offer of judgment is to preclude plaintiff's recovery of that portion of fees and costs related to work on the . . . claim after the date of the offer."). The court disagrees. During the course of this action, Rimini offered Oracle three separate Rule 68 Offers of Judgment. Defendants contend that the second Rule 68 offer for $60 million and the third offer for $100 million are both more favorable than the roughly $52 million obtained at trial. However, the court finds that these offers, which did not include any injunctive relief and proposed payment over several years without interest, were not "more favorable" than the ultimate judgment Oracle obtained in this action.

C. Costs

As part of its motion for attorneys' fees, Oracle seeks recovery of both taxable and nontaxable costs. *See* ECF No. 917. First, Oracle seeks to recover $4,950,566.70 in taxable costs, which includes deposition costs, document recovery and storage, and electronic discovery costs. Under Rule 54(d) of the Federal Rules of Civil Procedure, unless a federal statute or court order provides otherwise, costs should be awarded to the prevailing party. FED. R. CIV. P. 54(d)(1); *see also Ass'n of Mexican-Am. Educators v. State of California*, 231 F.3d 572, 591 (9th Cir. 2000). The court has reviewed Oracle's request for taxable costs and finds that they are recoverable and reasonable. *See* 28 U.S.C. § 1920. Therefore, the court shall award Oracle $4,950,566.70 in taxable costs.

Oracle also seeks to recover $17,636,755.68 in non-taxable costs. Section 505 of the Copyright Act permits a successful plaintiff to recover all costs incurred in litigation, not just taxable costs authorized by Rule 54(d) and 28 U.S.C. § 1920. *See Twentieth Century Fox Film Corp. v. Entm't Distrib.*, 429 F.3d 869, 885 (9th Cir. 2005). Here, Oracle's request for non-taxable costs includes litigation costs for expert witness fees, additional e-discovery fees not included under 28 U.S.C. § 1920, contract attorney services, jury consulting, and other non-taxable costs. As with Oracle's request for attorneys' fees, defendants object to several of the billing records and invoices submitted in support of Oracle's request.

The court has reviewed the documents and pleadings on file in this matter and finds that Oracle is entitled to an award of non-taxable costs in this

action for the same reasons the court is awarding attorneys' fees. However, similar to the award of fees, the court finds that Oracle is entitled to only a reduced amount of fees for various billing issues, including lost or non-validated invoices, vague billing descriptions and vague work entries. Because of these limited errors, the court finds that an overall reduction of 25% for almost all non-taxable costs is warranted.

As to defendants' specific challenge regarding the expert witness fees of Oracle's damages expert Elizabeth Dean, the court finds that a reduction of 50% of her expert fees and costs is appropriate. The court makes this additional reduction because, prior to trial, Oracle withdrew Dean's testimony as to one of its two damages theories in response to a motion to exclude by defendants. Thus, at trial, Oracle only presented half of Dean's prepared testimony. The court finds that it would not be fair or equitable to require defendants to pay for expert witness testimony that was withdrawn in response to their challenge, especially in light of the fact that by that time in the litigation, defendants had already deposed Dean, rebutted her report with an expert of their own, and filed a motion to exclude her report. Defendants should not bear the costs of creating the withdrawn portions of Dean's expert report. Therefore, reducing Oracle's request for costs by 50% for the expert witness costs of Elizabeth Dean ($1,812,066.02 to $906,033.01) and 25% for the rest of Oracle's requested non-taxable costs ($15,824,689.66 to $11,868,517.25), the court finds that Oracle is entitled to recover $12,774,550.26 in additional non-taxable costs for this action. Accordingly, the court shall grant Oracle's motion for

attorneys' fees and costs and award Oracle fees and costs in the amount of $46,227,363.36.

IT IS THEREFORE ORDERED that plaintiffs' motion for a preliminary injunction (ECF No. 900) is GRANTED in-part and DENIED in-part in accordance with this order. Plaintiffs shall have ten (10) days after entry of this order to prepare an appropriate permanent injunction that complies with the court's order and submit the same for signature.

IT IS FURTHER ORDERED that the clerk of court shall enter judgment in favor of plaintiffs Oracle America, Inc. and Oracle International Corporation and against defendants Rimini Street, Inc. and Seth Ravin on plaintiffs' ninth cause of action for unfair competition in violation of California's Unfair Competition Law.

IT IS FURTHER ORDERED that plaintiffs' motion for prejudgment interest (ECF No. 910) is GRANTED in-part and DENIED in-part in accordance with this order. Plaintiffs shall have ten (10) days after entry of this order to prepare an appropriate order setting prejudgment interest that complies with the court's order and submit the same for signature.

IT IS FURTHER ORDERED that plaintiffs' motion for attorneys' fees and costs (ECF No. 917) is GRANTED in accordance with this order. The clerk of court shall enter an award of attorneys' fees and costs in favor of plaintiffs Oracle USA, Inc.; Oracle America, Inc.; and Oracle International Corporation and against defendants Rimini Street, Inc. and Seth Ravin in the amount of $46,227,363.36.

IT IS SO ORDERED.

DATED this 21st day of September, 2016.

s/Larry R. Hicks

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ORACLE USA, INC., a Colorado corporation; ORACLE AMERICA, INC., a Delaware corporation; and ORACLE INTERNATIONAL CORPORATION, a California corporation, Plaintiffs, v. RIMINI STREET, INC., a Nevada corporation; and SETH RAVIN, an individual, Defendants.	Case No. 2:10-cv-0106-LRH-VCF **FED. R. CIV. P. 58 FINAL JUDGMENT IN A CIVIL ACTION**

Whereas this action was tried by a jury with the Hon. Larry R. Hicks presiding, and the jury rendered a verdict on October 13, 2015, and whereas further matters were heard by Judge Hicks and a decision was rendered on September 21, 2016, it is hereby ORDERED, ADJUDGED, and DECREED:

That Defendant Rimini Street, Inc. shall pay Plaintiff Oracle International Corporation the amount of $ 58,299,437.61 (representing $35,600,000 plus $22,691,741.52 in prejudgment interest through October 17, 2016 plus $7,696.36 for each additional day after October 17, 2016 until judgment is entered);

That Defendants Rimini Street, Inc. and Seth Ravin shall pay Plaintiff Oracle International Corporation the amount of $ 7,671,846.99 (representing $5,600,000 plus $2,071,005.46 in prejudgment interest through October 17, 2016 plus $841.53 for each additional day after October 17, 2016 until judgment is entered);

That Defendants Rimini Street, Inc. and Seth Ravin shall pay Plaintiff Oracle America, Inc. the amount of $ 12,092,748.86 (representing $8,827,000 plus $3,264,422.40 in prejudgment interest through October 17, 2016 plus $1,326.46 for each additional day after October 17, 2016 until judgment is entered);

That Defendants Rimini Street, Inc. and Seth Ravin shall pay Plaintiffs Oracle America, Inc., and Oracle International Corporation attorneys' fees and costs in the amount of $46,227,363.36;

That Defendants Rimini Street, Inc. and Seth Ravin shall pay post judgment interest on all amounts specified herein at the rate described in 28 U.S.C. § 1961 from the date of entry through the date of payment; and,

That Defendants Rimini Street, Inc. and Seth Ravin are enjoined in accordance with the permanent injunction set forth at ECF No. 1065.

SO ORDERED.

DATED this 18th day of October, 2016.

LANCE S. WILSON, CLERK

/s/

BY: Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ORACLE USA, INC., a Colorado corporation; ORACLE AMERICA, INC., a Delaware corporation; and ORACLE INTERNATIONAL CORPORATION, a California corporation, *Plaintiffs-Appellees,* v. RIMINI STREET, INC., a Nevada corporation; and SETH RAVIN, an individual, *Defendants-Appellants.*	Nos. 16-16832 16-16905 D.C. No. 2:10-cv-00106-LRH-VCF OPINION

Appeals from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

Argued and Submitted July 13, 2017
San Francisco, California

Filed January 8, 2018

Before: Susan P. Graber and Michelle T. Friedland, Circuit Judges, and Jeremy D. Fogel,* District Judge.

* The Honorable Jeremy D. Fogel, United States District Judge for the Northern District of California, sitting by designation.

SUMMARY**

Copyright

The panel affirmed in part, reversed in part, and vacated in part the district court's judgment after a jury trial in favor of Oracle USA, Inc., on its copyright infringement and California and Nevada state law claims against Rimini Street, Inc., a provider of third-party support for Oracle's enterprise software, and Seth Ravin, Rimini's CEO.

Oracle licenses its software and also sells its licensees maintenance contracts. The maintenance work includes software updates. In order to compete effectively with Oracle's direct maintenance services, Rimini needed to provide software updates to its customers. With Oracle's knowledge, Rimini copied Oracle's copyrighted software in order to provide the updates. Rimini obtained software from Oracle's website with automated downloading tools in direct contravention of the terms of the website.

The panel affirmed the district court's partial summary judgment and partial judgment after trial on Oracle's claims that Rimini infringed its copyright by copying under the license of one customer for work performed for other existing customers or for

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

unknown or future customers, rather than restricting such copying to work for that particular customer. The panel concluded that Rimini's activities were not permissible under the terms of the licenses Oracle granted to its customers. The panel rejected Rimini's argument that holding it accountable for its alleged conduct would condone misuse of Oracle's copyright.

The panel reversed the district court's judgment after trial with respect to Oracle's claims under the California Comprehensive Data Access and Fraud Act, the Nevada Computer Crimes Law, and California's Unfair Competition Law. The panel held that taking data from a website, using a method prohibited by the applicable terms of use, when the taking itself generally is permitted, does not violate the CDAFA or the NCCL. Accordingly, Rimini did not violate these computer abuse statutes by using automated tools to take data in direct contravention of Oracle's terms of use. Because the district court granted judgment in favor of Oracle on Oracle's Unfair Competition Law claim based on its finding that Rimini violated the CDAFA, the panel reversed the district court's determination that Rimini violated California's Unfair Competition Law.

The panel reduced the district court's award of damages by the amount based on Rimini's alleged violation of the CDAFA and NCCL. The panel affirmed the district court's award of prejudgment interest on the copyright claims.

The panel reversed the district court's permanent injunction based on alleged violations of the CDAFA. The panel vacated the district court's permanent injunction based on copyright infringement because the district court assessed the

relevant factors by reference to both the copyright and the CDAFA claims, without considering separately the propriety of issuing an injunction as to the copyright claims alone.

The panel reversed the district court's judgment with respect to Ravin's liability for attorneys' fees. As to Rimini, the panel vacated the fee award and remanded for reconsideration in light of Oracle's more limited success at litigation in view of the panel's conclusion that there was no violation of the state computer laws.

The panel reduced the district court's award of taxable costs and affirmed its award of non-taxable costs.

COUNSEL

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Jamie Williams and Aileen Nguyen, San Francisco, California, as and for Amicus Curiae Electronic Frontier Foundation.

OPINION

FOGEL, District Judge:

Oracle USA, Inc. and related entities (collectively, "Oracle") licenses its proprietary enterprise software for a substantial one-time payment. Oracle also sells its licensees maintenance contracts for the software that are renewed on an annual basis. The maintenance work includes software updates, which Oracle makes available to purchasers of the contracts through its support website.

At all relevant times, Rimini Street, Inc. ("Rimini") provided third-party support for Oracle's enterprise software, in lawful competition with Oracle's direct maintenance services. But in order to compete effectively, Rimini also needed to provide software updates to its customers.[1] Creating these software updates inherently required copying Oracle's copyrighted software, which, unless allowed by license, would be copyright infringement. With Oracle's knowledge, Rimini in fact did copy the software to provide the updates. At least from late 2006 to early 2007, Rimini obtained software from Oracle's website with automated downloading tools in direct contravention of the terms of use of the website.

[1] All of Rimini's customers pertinent to this dispute were licensees of Oracle's software, but not all licensees of Oracle's software are Rimini's customers. To avoid confusion, we will use the word "customers" to refer to the subset of Oracle's licensees who did contract or might contract with Rimini for the maintenance of Oracle's software.

Oracle filed suit against Rimini and Rimini's CEO, Seth Ravin ("Ravin"), in the District of Nevada in 2010. After lengthy and sometimes contentious discovery and motion practice, the district court granted partial summary judgment to Oracle on certain aspects of Oracle's copyright infringement claim, and a jury found in favor of Oracle on others after trial. The jury also found against both Rimini and Ravin with respect to Oracle's claims under the California Comprehensive Data Access and Fraud Act ("CDAFA") and the Nevada Computer Crimes Law ("NCCL") (collectively, the "state computer laws"). Based on the jury's determination with respect to the CDAFA claim, the district court entered judgment against Rimini and Ravin under California's Unfair Competition Law ("UCL"). The jury awarded damages in the sum of $50,027,000 which, when prejudgment interest, attorneys' fees and costs were added, resulted in a total monetary judgment of $124,291,396.82. The district court also issued an extensive permanent injunction. Rimini subsequently filed this timely appeal. The Electronic Frontier Foundation ("EFF") has filed an amicus brief with respect to the state computer law claims.

The first principal dispute in this case is whether Rimini copied Oracle's software in a manner that infringed Oracle's copyright. It is undisputed that Rimini used Oracle's software to develop and test updates for its customers and that the software licenses, with certain restrictions, permitted Oracle's licensees to hire Rimini to perform such work for them. There are numerous subtleties involved but, at the highest level of generality, Rimini's alleged copyright infringement included copying under the license of one customer for work for other existing customers or for unknown or future customers,

rather than restricting such copying to work for that particular customer. The second principal dispute is whether Rimini and Ravin violated applicable state laws intended to prevent computer-based fraud by flouting Oracle's restrictions against the use of automated tools to download software from its website. We also consider the appropriateness of the remedies awarded by the district court.

As explained below, we affirm the judgment with respect to the copyright infringement claims. We also affirm the remedies with respect to those claims, except that we vacate the injunction and the award of attorneys' fees and remand for reconsideration in light of this opinion. We modify the district court's award of taxable costs as the parties have agreed. We reverse the judgment with respect to Oracle's claims under the state computer laws and the UCL.

I. Copyright Infringement Claims

A. The Software in Suit[2]

Four software products are at issue: J.D. Edwards, Siebel, PeopleSoft, and Database. The products are related, but they do not perform identical functions. As the district court explained:

> Oracle's Enterprise Software platforms have both an installed database component and an installed application component. The database component

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[2] The district court specifically distinguished between Oracle's copyright in software and Oracle's copyright in the software documentation. Rimini does not appeal the jury's determination that Rimini infringed the documentation copyright.

> provides a foundation for the application software which then uses, stores, and retrieves data in the database for use across an entire organization. Oracle's Enterprise Software application programs—including its PeopleSoft, J.D. Edwards, and Siebel-branded products—are run on Oracle's Relational Database Management Software ("Oracle Database") as the database component for the programs.

Oracle USA, Inc. v. Rimini St., Inc., 6 F. Supp. 3d 1108, 1113 (D. Nev. 2014) ("*Oracle II*"). J.D. Edwards, Siebel, and PeopleSoft were acquired by Oracle from other companies, while Oracle developed Database internally.

Because of this history and because of the technical differences among them, the licensing terms of the four products are not identical. We first address J.D. Edwards and Siebel. We next turn to PeopleSoft and, finally, to Database.

B. J.D. Edwards and Siebel

Oracle's claims as to the J.D. Edwards and Siebel software were submitted to the jury. Rimini appeals the district court's denial of its motion for judgment as a matter of law following the jury's verdict. "We review de novo the district court's denial of a motion for judgment as a matter of law. A renewed motion for judgment as a matter of law is properly granted only 'if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict." *Castro v. Cty. of Los*

Angeles, 833 F.3d 1060, 1066 (9th Cir. 2016) (en banc) (citations omitted) (quoting *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002)) (internal quotation mark omitted), *cert. denied*, 137 S. Ct. 831 (2017). "A jury's verdict must be upheld if it is supported by substantial evidence, which is evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion." *Id.* (quoting *Pavao*, 307 F.3d at 918) (internal quotation marks omitted).

Rimini challenges the jury's finding of copyright infringement with respect to these products on two grounds. First, it argues that its activities were permissible under the terms of the licenses Oracle granted to its customers. Second, it contends that holding it accountable for its alleged conduct would condone copyright misuse. Neither of these arguments is persuasive.

1. Express License Defense

As will be explained in further detail, there is no dispute that, absent an applicable license, Rimini's accused acts violated the exclusive right Oracle enjoys as owner of the software copyright to copy or to modify the software. Rimini asserts as an affirmative defense that its accused acts were expressly licensed.

The Supreme Court has explained the express license defense as follows:

> "Anyone who violates any of the exclusive rights of the copyright owner," that is, anyone who trespasses into his exclusive domain by using or authorizing the use of the copyrighted work in one of the five ways set forth in

> the statute, "is an infringer of the copyright." Conversely, anyone who is authorized by the copyright owner to use the copyrighted work in a way specified in the statute . . . is not an infringer of the copyright with respect to such use."

Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 433 (1984) (quoting 17 U.S.C. § 501(a)). Thus, "[t]he existence of a license creates an affirmative defense to a claim of copyright infringement." *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1114 (9th Cir. 2000). However, "[w]hen a licensee exceeds the scope of the license granted by the copyright holder, the licensee is liable for infringement." *LGS Architects, Inc. v. Concordia Homes of Nev.*, 434 F.3d 1150, 1156 (9th Cir. 2006).

As Rimini itself did not have a license to copy or to modify from Oracle, the success of Rimini's affirmative defense turns on whether Rimini's accused acts came within the scope of licenses held by its customers.

a) Software Licenses

The pertinent provisions of the J.D. Edwards and Siebel licenses are excerpted below:

J.D. Edwards	"Customer shall not, or cause anyone else to . . . (iii) copy the Documentation or Software except to the extent necessary for Customer's archival needs and to support the Users."

Siebel	"Customer" may "reproduce, exactly as provided by [Oracle], a reasonable number of copies of the Programs and the Ancillary Programs solely for archive or emergency back-up purposes or disaster recovery and related testing."

Like the language of the licenses themselves, the district court's constructions of the two licenses when instructing the jury were similar.

The district court told the jury that it was permissible for Rimini, as a third-party, to make copies of the Oracle software to support its customers by archiving, backup, and related testing. At the same time, the district court instructed that the licenses "do[] not mean that a third party like Rimini Street is authorized to make copies of the . . . software application . . . to use the customer's software . . . to support other customers."

b) Accused Acts

(1) Background

Work produced by humans is rarely if ever perfect, and computer software is no exception. Even casual users of computers are familiar with regular software patches and updates intended to correct glitches and to modify software in light of changing circumstances.

However, unlike the off-the-shelf consumer software used by individuals in everyday life, enterprise software employed by large organizations

is customized around the organizations' specific needs. While producers of consumer software generally design updates around standard use cases and make them available for end users to download and install directly, updates to enterprise software must be tested and modified to fit with bespoke customizations before being put to actual use.

This testing process requires the creation of "development environments." A "development environment," sometimes called a "sandbox," is distinct from a "production environment," which is the "live" version of the software that members of the enterprise ultimately deploy. As the district court explained:

> In order to develop and test software updates for Enterprise Software, support service providers . . . create development environments of the software. A development environment is a software environment that contains a copy of the software program which is then modified to develop and test software updates. Given the critical nature of Enterprise Software programs, updates to the software must be fully tested and verified in a development environment before they are provided to a customer.

Oracle USA, Inc. v. Rimini St., Inc., 6 F. Supp. 3d 1086, 1092 n.4 (D. Nev. 2014) ("*Oracle I*").

In other words, the very work of maintaining customized software requires copying the software, which without a license to do so is a violation of the exclusive right of the copyright owner. Here, it is

undisputed that the licenses generally permit Oracle's licensees to maintain the software and make development environments for themselves. However, some licensees of the software, lacking either the capability or the interest, opt to outsource the work of maintenance to others, such as Rimini or even Oracle itself.

(2) "Direct Use" and "Cross Use"

Oracle alleges that Rimini engaged in two distinct types of copyright infringement with respect to J.D. Edwards and Siebel. The first has to do with the way it created development environments, under color of a license held by these particular, identifiable customers of Rimini, for that specific customer. We refer to this as "direct use."

The second is "cross use."[3] "Cross use," generally speaking, is the creation of development environments, under color of a license of one customer, to support *other* customers. There are numerous forms of "cross use." In its narrowest form, "cross use" is the making of development environments, under color of a license held by one identifiable customer of Rimini, for another identifiable customer of Rimini that also holds a license. It also may include the creation of development environments under a given license for other customers of Rimini that may themselves hold

[3] Rimini offered this description of its "cross use" in its closing statement to the jury: "If we have multiple clients with the exact same release, the same rights, we would come up with one fix and then apply it to other customers that had the exact same rights. That's the cross-use, the reusing of updates that you've heard about in this case."

licenses or even for licensees who have yet to become customers of Rimini. Rimini claims that "cross use" is not infringement, arguing that it may create environments without restriction because any organization that might hire Rimini to service its software would itself have a license to create development environments. Rimini's counsel explained at oral argument that "cross use" enabled it to reduce expense by reusing work it had done for one customer in providing service to others.

c) Analysis

Rimini argues on appeal that the jury instructions were erroneous because they suggested that certain direct uses and cross uses were prohibited while Rimini believes they were permitted.

With respect to "direct use," we may dispose quickly of Rimini's claim that the district court construed "direct use" out of the licenses. Rimini successfully persuaded the district court to include the language, "to support the customer's use," in its jury instruction about the J.D. Edwards license. The instruction concerning Siebel told the jury specifically that Rimini could hold copies of the Siebel software application "solely for customer's archive or emergency back-up purposes or disaster recovery and related testing." Rimini did not object to that instruction at trial, and, contrary to Rimini's arguments on appeal, those instructions treated these forms of direct use as permitted.

Rimini also argues, however, that the instructions should have approved expressly of other forms of direct use. The district court had no reason or need to instruct the jury that the licenses

permitted other types of direct use, because, as the district court's order shows, Rimini had represented that the only forms of direct use it engaged in were those allowed by the instruction:

> Rimini has proffered evidence that the development environments associated with [specific Siebel licensee] are used exclusively for archival and back-up purposes, and related testing, as directly contemplated by [the license].

Oracle I, 6 F. Supp. 3d at 1105 n.20; *see also id.* at 1103 (similar findings concerning J.D. Edwards). Had Rimini wanted a broader construction, Rimini should have said so in district court. Having failed to do that, Rimini cannot complain that the jury found that Rimini's direct use with respect to J.D. Edwards and Siebel exceeded the scope of the licenses.

With respect to "cross use," Rimini's assertion—made for the first time in its reply brief to us—that "cross use" is a contractual rather than a copyright issue is not properly before us. The principal case on which Rimini relies, *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, 629 F.3d 928 (9th Cir. 2011), was not cited in Rimini's opening brief, and "on appeal, arguments not raised by a party in its opening brief are deemed waived," *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999).[4]

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[4] Even if we were to consider the applicability of *MDY Industries*, that case teaches specifically the distinction between "conditions," "the breach of which constitute copyright infringement," and "covenants," "the breach of which is actionable only under contract law." 629 F.3d at 939. Rimini

As to the substance of its position, Rimini argues that, contrary to the jury instructions, the licenses in fact permit "cross use." It observes that: 1) each of Rimini's customers had its own license; 2) each license permits copies to be made for archival and support purposes; 3) the licenses authorize the customers to outsource the archival and support work to third parties; and 4) such archival and support work includes the creation of development environments. Rimini dismisses evidence showing that it created development environments for future customers using the license of an existing customer on the basis that future customers presumably would have licenses that would permit them to hire Rimini to create development environments.

Oracle properly responds that each of the licenses at issue here "pointedly limits copying and use to supporting the '*Licensee*.'" The licenses do not authorize Rimini to "develop products *Rimini* could sell for *Rimini's* financial gain." Any work that Rimini performs under color of a license held by a customer for other existing customers cannot be considered work in support of that particular customer. The same logic applies to work Rimini performs for unknown, future customers. The licensees may hire a third party such as Rimini to maintain their software for them, but nothing in the licenses permits them to grant a nonparty to the license a general right to copy proprietary software.

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has offered no analysis as to which terms of the licenses at issue are "conditions" and which are "covenants."

2. Copyright Misuse

We turn next to the question of copyright misuse, which Rimini asserts as a defense. The copyright misuse doctrine prevents holders of copyrights "from leveraging their limited monopoly to allow them control of areas outside the monopoly." *Apple Inc. v. Psystar Corp.*, 658 F.3d 1150, 1157 (9th Cir. 2011). (quoting *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1026 (9th Cir. 2001)) (internal quotation marks omitted). To that end, while it "does prevent copyright holders from using the conditions to stifle competition," "[t]he copyright misuse doctrine does not prohibit using conditions to control use of copyrighted material." *Id.* at 1159. Accordingly, the doctrine is to be "applied . . . sparingly"; specifically, it operates when copyright holders attempt to impose license agreements that would "prevent[] . . . licensee[s] from using *any other competing product*." *Id.* at 1157 (emphasis added).

Rimini claims that holding it liable for copyright infringement would condone misuse of Oracle's copyright. In Rimini's view, the district court's pretrial construction of the licensing terms, as embodied in the jury instructions, "would foreclose competition in the aftermarket for third-party maintenance" because it would limit copies made by third parties to those made only for archival and emergency backup purposes and because the software could not be serviced simply by making exact copies. Oracle counters that the licenses "plainly do not preclude third parties from developing competing software or providing competing support services," but instead "require third parties to do so in ways that do not disregard Oracle's exclusive rights under copyright law."

We agree with Oracle. The district court did not construe the licenses to permit only archival and emergency backup purposes. For example, the jury instructions as to J.D. Edwards stated specifically:

> If you find that the copies of the J.D. Edwards software application . . . housed on Rimini Street's servers were used solely for the customer's archival needs and *to support the customer's use*, then that use is authorized by the J.D. Edwards software license agreement . . .

The district court gave similar instructions as to Siebel. ("[Y]ou are informed that the court has ruled as a matter of law that the Siebel software license agreements authorized . . . Rimini Street to make a reasonable number of copies . . . solely for the customer's archive or emergency back-up purposes or disaster recovery *and related testing*." (emphasis added)). These constructions would not preclude Rimini from creating development environments for a licensee for various purposes *after* that licensee has become a customer of Rimini.

The only remaining question is whether it would be copyright misuse to forbid Rimini from creating development environments for licensees *before* they have become customers or, in other words, whether it would contravene the policy of the Copyright Act to allow Oracle, as a copyright holder, to have a head start in making copies. The Supreme Court has held that "the right of first publication" is "an important marketable subsidiary right." *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985). Just as a copyright holder has the "right of first publication," it also must enjoy the right of "first

copy." Giving a head start to Oracle in creating development environments is entirely consistent with the Supreme Court's teaching in *Harper*.

C. PeopleSoft

The district court granted summary judgment on Oracle's copyright claim with respect to PeopleSoft. "This Court reviews a district court's grant of summary judgment de novo. The Court must 'determine whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law.'" *Mitchell v. Washington*, 818 F.3d 436, 441–42 (9th Cir. 2016) (quoting *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc)).

Rimini again asserts an express license defense and contends that it would be copyright misuse to hold it liable for infringement. Again, its arguments are without merit.

1. Express License Defense

The PeopleSoft license is similar to its J.D. Edwards and Siebel counterparts, but it contains an additional limitation about "[the licensee's] facilities":

PeopleSoft[5]	"Licensee may . . . make a reasonable number of copies of the Software, solely for: (i) use in accordance with the terms set forth herein . . .; (ii) archive or emergency back-up purposes; and/or (iii) disaster recovery testing purposes[.]" "PeopleSoft grants Licensee a . . . license to use the licensed Software, solely for Licensee's internal data processing operations at its facilities[.]"

Based on this limitation, the district court construed the PeopleSoft license more restrictively than the J.D. Edwards and Siebel licenses. Specifically, it stated that "[the PeopleSoft license] expressly limits copying the licensed software to only the [licensee's] facilities." *Oracle I*, 6 F. Supp. at 1097 (emphasis omitted).

Because of the difference in the construction of the pertinent licenses, the nature of Oracle's claim concerning PeopleSoft is somewhat different in character from those concerning J.D. Edwards and Siebel. Specifically, the accused act concerning PeopleSoft is the creation of development environments, whether for "direct use" or "cross use,"

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[5] Two different PeopleSoft licenses are at issue here, one belonging to the City of Flint and the other to the Pittsburgh Public Schools. The district court concluded that the two licenses have "similar" language. *Oracle I*, 6 F. Supp. 3d at 1100. On appeal, the parties make no distinction between the two licenses; the language discussed here is drawn from the license held by the City of Flint.

on Rimini's own computers, as opposed to the licensees' computers. Rimini describes this practice as "local hosting," a term that we adopt in this opinion. Rimini asserts that it does this to avoid transmission delays.

In the words of the district court, "it is undisputed that Rimini made copies of the licensed software at its own facilities and *outside the control* of the [customers]." *Id.* at 1101 (emphasis added). The district court concluded that the PeopleSoft licenses of Rimini's customers "do[] not authorize Rimini's off-site copies of the licensed software," and therefore granted summary judgment to Oracle on the copyright infringement claims as to PeopleSoft. *Id.* at 1097.

On appeal, Rimini contends that "[a licensee's] facilities" can span Rimini's own servers. In its words:

> Sophisticated companies like Oracle's customers (and Rimini's clients) do not keep all their servers on the actual premises of their principal place of business . . . . They may own some, lease others, and contract with third parties for still more capacity. All are encompassed within the plain meaning of "facilities."

We agree with Oracle that "facilities under the control of a third party" could not qualify as "the *licensee*'s facilities." It was not only sensible but also necessary for the district court to read a requirement of "control" into the definition of "[a licensee's] facilities." The record supports the district court's conclusion that the Rimini servers where the copying

took place were "outside the control of the [customers]." *Id.* at 1101. Indeed, Rimini made no showing that its customers had even constructive control of the servers.[6]

2. Copyright Misuse

As just explained, the district court concluded that Rimini infringed the PeopleSoft copyright by "local hosting," that is, by maintaining copies of PeopleSoft on its own computers as opposed to its customers' computers. *Oracle I*, 6 F. Supp. 3d at 1097. Rimini offers no argument as to why a restriction on the location of copies would stifle competition and run afoul of the copyright misuse doctrine. *Id.* Rimini's inability to "local host" may result in inconvenience and expense on its part, but that restriction on its conduct does not amount to copyright misuse. Indeed, at oral argument, Rimini admitted that the restriction against "local hosting" was one it could overcome.

D. Database

The district court also granted summary judgment for Oracle on the Database copyright infringement claim. It was undisputed that Rimini copied Oracle's copyright protected software when it built development, or non-production, environments for a number of Rimini customers using Oracle Database.

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[6] Because we address the question of infringement as to PeopleSoft on the narrow ground of "local hosting," we do not decide whether "direct use" or "cross use" was permitted by the PeopleSoft license.

Rimini's arguments on appeal with respect to Database are the same as those with respect to the other software at issue, except that here Rimini contends that its acts in fact were authorized by the Oracle License and Service Agreements ("OLSAs"). Oracle properly points out that Rimini has waived this point because it has failed to challenge the district court's legal conclusion that Rimini was not entitled to assert the OLSAs as a defense. Accordingly, we affirm the district court's determination of copyright infringement as to Database.

II. State Computer Law Claims

A. The CDAFA and the NCCL

The CDAFA is California's computer abuse law. It states, in relevant part, that:

> any person who commits any of the following acts is guilty of a public offense:
>
> . . . .
>
> (2) Knowingly accesses and without permission takes, copies, or makes use of any data from a computer, computer system, or computer network, or takes or copies any supporting documentation, whether existing or residing internal or external to a computer, computer system, or computer network.
>
> (3) Knowingly and without permission uses or causes to be used computer services.

CAL. PENAL CODE § 502(c). It provides a cause of action to "the owner or lessee of the computer, computer system, computer network, computer program, or data who suffers damage or loss by reason of a violation." *Id.* § 502(e)(1).

The NCCL is Nevada's counterpart to the CDAFA. In relevant part, it provides that "a person who knowingly, willfully and without authorization: (a) Modifies; (b) Damages; (c) Destroys; (d) Discloses; (e) Uses; (f) Transfers; (g) Conceals; (h) Takes; (i) Retains possession of; (j) Copies; (k) Obtains or attempts to obtain access to, permits access to or causes to be accessed; or (l) Enters data, a program or any supporting documents which exist inside or outside a computer, system or network" or "who knowingly, willfully and without authorization: (a) Destroys; (b) Damages; (c) Takes; (d) Alters; (e) Transfers; (f) Discloses; (g) Conceals; (h) Copies; (i) Uses; (j) Retains possession of; or (k) Obtains or attempts to obtain access to, permits access to or causes to be accessed, a computer, system or network" is guilty of a misdemeanor. NEV. REV. STAT. § 205.4761(1), (3). The NCCL also provides a civil cause of action to "[a]ny victim of [such a misdemeanor]." *Id.* § 205.511(1).

B. Accused Acts

The ultimate question as to whether Rimini and Ravin (referred to collectively in this section as "Rimini") violated the state computer laws by downloading content from Oracle's website was submitted to the jury, which found in favor of Oracle. In denying Rimini's renewed motion for judgment as a matter of law, the district court observed that Oracle had for some time "encouraged its customers to use automated downloading tools as a means to

obtain" large numbers of customer support files in a timely manner. *Oracle USA, Inc. v. Rimini St., Inc.*, 191 F. Supp. 3d 1134, 1139 (D. Nev. 2016) ("*Oracle III*"). Rimini had been doing just that when, "in response to an increased volume of mass downloads through the use of automated tools, and other server and database pressures, Oracle America changed its website's Terms of Use to specifically prohibit the use of 'any software routines commonly known as robots, spiders, scrapers, or any other automated means to access [the site] or any other Oracle accounts, systems or networks,'" a change which "prohibited the use of previously allowed automated downloading tools." *Id.* at 1139–40 (alteration in original). The evidence showed that, in response, Rimini stopped using automatic downloading tools for about a year but then "began reusing automated tools on the website in violation of the Terms of Use (terms which it had to specifically agree to when logging on to the website) in order to download full libraries of support documents and files for entire software products lines—each involving hundreds of thousands of different files." *Id.* at 1140.

C. Positions of the Parties

Rimini and EFF contend that the statutory language "without permission" should not be read in a way that criminalizes violation of a website's terms of use. As EFF puts it, "[n]either statute . . . applies to bare violations of a website's terms of use—such as when a computer user has permission *and* authorization to access *and* use the computer or data at issue, but simply accesses or uses the information in a manner the website owner does not like."

Oracle, on the other hand, urges us to read the state statutes as not requiring unauthorized access

for a violation, which appears to be how the district court construed them. *See id.* at 1143–44 (holding that Rimini's "claim that they had permission from their clients to access Oracle['s] . . . website is irrelevant" under the state statutes).

D. Analysis

We review the denial of Rimini's motion for judgment as a matter of law de novo. *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1066 (9th Cir. 2016) (en banc).

The district court treated the two statutes as essentially identical, and for purposes of this appeal, we will take the CDAFA as representative. As the district court observed, "[w]hile the case law on the NCCL is limited, the statute covers the same conduct as the CDAFA and the same legal reasoning should apply." *Oracle III*, 191 F. Supp. 3d at 1144. The parties appear to agree with this approach; indeed, their arguments about liability do not differentiate between the two statutory schemes.

Here, there is no question that Rimini "t[ook]" and "m[ade] use of" "data." *See Oracle III*, 191 F. Supp. 3d at 1143 ("Nor do defendants contest that they took and subsequently used data from the website . . . ."). Nor is there any dispute that Oracle permitted some degree of access and taking from its website. *Id.* at 1139–40. ("[Oracle America] owns and operates a website that . . . contains millions of technical support files . . . . [T]his online database was accessible through a website that required both the customer's unique [login] and acceptance of the website's specific Terms of Use." (footnote omitted)). The central issue here is whether, by using

automated tools to take data in direct contravention of Oracle's terms of use, Rimini violated the statutes.

We hold that taking data using a *method* prohibited by the applicable terms of use, when the taking itself generally is permitted, does not violate the CDAFA. Because the same reasoning applies to the NCCL claim, we reverse the judgment as to both claims.

Oracle obviously disapproved of the method—automated downloading—by which Rimini took Oracle's proprietary information. But the key to the state statutes is whether Rimini was authorized in the first instance to take and use the information that it downloaded. *See United States v. Christensen*, 828 F.3d 763, 789 (9th Cir. 2015) (emphasis added) ("A plain reading of the [CDAFA] demonstrates that *its focus is on unauthorized taking or use of information.*").

Because it indisputably had such authorization, at least at the time it took the data in the first instance, Rimini did not violate the state statutes. This result is consistent with our decision in *Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058, 1069 (9th Cir. 2016), *cert. denied*, 138 S. Ct. 313 (2017) (affirming the district court's holding that the defendant violated the CDAFA on the ground that the defendant "*without permission* took, copied, and made use of [the downloaded] data" (emphasis added)).

III. Violation of California's Unfair Competition Law

A violation of California's UCL occurs where there is a predicate offense, one of which is a violation of the CDAFA. CAL. BUS. & PROF. CODE § 17200. The district court granted judgment in favor

of Oracle on its UCL claim based on its finding that Rimini and Ravin had violated the CDAFA. Because we reverse as to the CDAFA claim, we also reverse the district court's determination that Rimini and Ravin violated the UCL.

IV. Damages[7]

The jury awarded a total of $14,427,000 to two Oracle subsidiaries based on Rimini's alleged violation of the CDAFA and NCCL. Because we have concluded that Rimini did not violate those laws, we reduce damages by this amount.

V. Prejudgment Interest

We review a district court's decision to award prejudgment interest for abuse of discretion. *Barnard v. Theobald*, 721 F.3d 1069, 1075 (9th Cir. 2013). We also review the rate used by the district court to calculate the prejudgment interest for abuse of discretion. *Blankenship v. Liberty Life Assurance Co. of Bos.*, 486 F.3d 620, 628 (9th Cir. 2007).

The district court awarded $22,491,636.16 in prejudgment interest on the copyright claims and $5,279,060.12 in prejudgment interest on the NCCL claims. Because we have concluded that Rimini did not violate the NCCL, we reverse as to the latter amount. For the reasons discussed below, we affirm as to the former.

We have held that "[g]enerally, 'the interest rate prescribed for post-judgment interest under 28 U.S.C. § 1961 is appropriate for fixing the rate of pre-

[7] Rimini does not challenge the amount of the jury's award of $35,600,000 in damages for copyright infringement.

judgment interest unless the trial judge finds, on substantial evidence, that the equities of that particular case require a different rate.'" *Blankenship*, 486 F.3d at 628 (quoting *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1164 (9th Cir. 2001)).

The district court calculated its award of $22,491,636.16 based upon the Treasury rate on the date infringement began, that is, 5.07% in October 2006, rather than on the "starting point" set forth in 28 U.S.C. § 1961, that is, 0.61% in October 2016. The district court explained its deviation from the normal rate, which resulted in a difference of approximately $20,000,000, as follows:

> [T]he court finds that there is good cause to set the prejudgment interest rate at the Treasury rate on the date infringement began, rather than at the time of judgment. The court makes this finding because of the nature of the jury's award of hypothetical license damages. As the jury awarded damages to Oracle in an amount it would have received from Rimini for licensing Oracle's software at the time it began infringing Oracle's copyrights in late 2006, the court finds that this is the relevant time period for prejudgment interest. After this date, when Rimini began infringing Oracle's copyrights, Oracle lost out on the licensing fees it would have received, absent infringement. It is not equitable in the court's view to allow defendants to reap a windfall by the lower interest rates

> that are now available simply because they engaged in discovery delays and other litigation tactics (addressed more thoroughly in Oracle's motion for attorneys' fees) that kept this action in litigation for several years. Therefore, the court shall . . . set the appropriate rate for prejudgment interest under the Copyright Act as the weekly average one-year constant maturity Treasury yield at the start of the infringement.

Despite these specific findings, Rimini asserts that the district court failed to make the "exceptional case" determination that would permit it to depart from the presumptive rate set forth in 28 U.S.C. § 1961. It contends that the district court may not set the interest rate based on a defendant's bad behavior, citing our holding in *Dishman v. UNUM Life Insurance Co. of America* for the proposition that, "[a]lthough a defendant's bad faith conduct may influence whether a court awards prejudgment interest, it should not influence the rate of the interest." 269 F.3d 974, 988 (9th Cir. 2001). Rimini also asserts that the 0.61% adequately represents market rates and fully compensates Oracle's loss.

It is true that "prejudgment interest is an element of compensation, not a penalty." *Barnard*, 721 F.3d at 1078. Rimini is correct that it would have been improper for the district court to set a higher rate based on Rimini's litigation conduct alone. But considering the district court's analysis in its totality, it is apparent that the rate was based primarily on the jury's award of copyright damages based on a hypothetical license, making it appropriate to approximate the licensing fees that

Oracle "lost out on" and "would have received, absent infringement" by using the Treasury rate on the date of infringement.

The district court made an extensive and detailed record throughout many years of complex and contentious litigation. Its understandable frustration with Rimini's litigation conduct is apparent in some of the orders now before us. However, there is ample evidence in the record to support the court's award of prejudgment interest at the Treasury rate on the date infringement began. We find no abuse of discretion.

VI. Injunctive Relief

> As to [a] permanent injunction, we review the legal conclusions de novo, the factual findings for clear error, and the decision to grant a permanent injunction, as well as its scope, for an abuse of discretion. To review for abuse of discretion, "we first look to whether the trial court identified and applied the correct legal rule . . . [then] to whether the trial court's resolution of the motion resulted from a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record."

Columbia Pictures Indus., Inc. v. Fung, 710 F.3d 1020, 1030 (9th Cir. 2013) (quoting *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc)).

The district court entered permanent injunctions against Rimini based on copyright infringement and against Rimini and Ravin based on alleged violations

of the CDAFA.[8] We stayed both injunctions pending resolution of this appeal.

In view of our conclusion that there was no violation of the state computer laws, we reverse as to the CDAFA injunction. As explained below, we vacate the copyright injunction and remand for reconsideration in light of our opinion.

The Supreme Court established a four-factor test that must be applied before a district court may grant a permanent injunction. *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Here, the district court assessed the four factors by reference to *both* the copyright and the CDAFA claims, without considering separately the propriety of issuing an injunction as to the copyright claims alone. For example, the court concluded that Rimini's "violations of state computer access statutes" contributed to an "irreparable injury" to Oracle's business reputation and goodwill.

Based on the record before us, we do not know how the district court would weigh the *eBay* factors with respect to the copyright claims alone. We express no view on the propriety or scope of any injunctive relief, which are matters committed to the district court's discretion in the first instance.

VII. Fees

"We review the award of fees and costs for abuse of discretion, but will overturn it if it is based on an erroneous determination of law." *Durham v.*

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[8] The injunction entered by the district court is clearly divided into separate portions. We therefore treat the injunction as if there were two separate injunctions.

Lockheed Martin Corp., 445 F.3d 1247, 1250 (9th Cir. 2006).

The district court awarded $28,502,246.40 in attorneys' fees to Oracle. It concluded that this award was appropriate under the fee-shifting provisions of the Copyright Act and the state computer laws. Although Ravin was not found liable for copyright infringement, the district court decided that Ravin was, along with Rimini, "severally and equally" liable for the award because he had violated the state computer statutes.

In view of our conclusion that there was no violation of the state computer laws, we reverse the judgment with respect to Ravin's liability for fees. As to Rimini, we vacate the fee award and remand for reconsideration in light of Oracle's more limited success at litigation.

VIII. Costs

A. Taxable Costs

The district court awarded Oracle $4,950,566.70 in taxable costs. Rimini originally asked us to reduce this award by approximately $1,700,000, contending that Oracle only requested roughly $3,200,000 in taxable costs in the district court. Oracle conceded that approximately $1,500,000 in non-taxable costs improperly was counted as taxable. About $200,000 remains in dispute.

The district court's cost award apparently was based on the following chart it received from Oracle:

Attorneys' Fees	**DKt. 996. Ex. 1**	**Adjustments**	**Final**
Bingham and Morgan Lewis	$18,695.129.67[1]		$18.695.129.67
Boles Schiller	$12.542.840.00[2]	*-$6,480.00*[3]	$12.536,360.00
H5 & Huron	$4,360,943.20[4]		$4.360.943.20
Other (Black Letter, Barg Coffin)	$28,895.12[5]		$28.895.12
TOTAL ATTORNEYS' FEES	$35.627.807.99		**$35,621,327.99**
Taxable Costs			
Deposition Costs	$192.999.70[6]		$192.999.70
Stroz Fees for Oracle Productions	$4.757.561.00[7]	*-$1.515,279.45*[8]	$3.242.281.55
TOTAL TAXABLE COSTS	$4.950.560.70		$3,435,281.25

The district court evidently read the wrong column when it awarded $4,950,566.70 in taxable costs. Given the parties' agreement that Oracle is entitled to about $3,200,000 in taxable costs, the remaining dispute involves $192,999.70 in deposition costs. Because Rimini's briefs articulate no basis for our doing so, we do not disturb the district court's inclusion of these expenses in the taxable cost award. We thus reduce the award to $3,435,281.25.

B. Non-taxable Costs

Title 17 U.S.C. § 505 provides:

> In any civil action under [the Copyright Act], the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

By contrast, 28 U.S.C. § 1920 identifies only six categories of costs that are taxable against the losing party.

In *Twentieth Century Fox v. Entertainment Distribution*, we held that, because 17 U.S.C. § 505 permits the award of *full* costs, the award of costs under § 505 is not limited to the categories of costs described in 28 U.S.C. § 1920. 429 F.3d 869, 885 (9th Cir. 2005). Here, relying expressly on *Twentieth Century Fox*, the district court awarded Oracle $12,774,550.26 in non-taxable costs.

Rimini contends that *Twentieth Century Fox* has been abrogated by *Marx v. General Revenue Corp.*,

568 U.S. 371 (2013), and that, accordingly, the district court erred. We disagree.

We are bound by our precedent unless the theory or reasoning of the decision is "clearly irreconcilable" with a higher intervening authority, such as a decision by the Supreme Court. *Miller v. Gammie*, 335 F.3d 889, 899–900 (9th Cir. 2003) (en banc). Our decision in *Twentieth Century Fox* concerned the relationship between 17 U.S.C. § 505 and 28 U.S.C. § 1920. The Supreme Court's decision in *Marx* concerned neither statute. Instead, the Court held that 15 U.S.C. § 1692k(a)(3) is not contrary to the costs provision in Federal Rule of Civil Procedure 54(d)(1). Nothing in *Marx* is clearly irreconcilable with *Twentieth Century Fox*.

The parties shall bear their own costs on appeal.

AFFIRMED in Part, REVERSED in Part, VACATED and REMANDED in Part.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ORACLE USA, INC., a Colorado corporation; ORACLE AMERICA, INC., a Delaware corporation; and ORACLE INTERNATIONAL CORPORATION, a California corporation, Plaintiffs-Appellees, v. RIMINI STREET, INC., a Nevada corporation; and SETH RAVIN, an individual, Defendants-Appellants.	Nos. 16-16832 16-16905 D.C. No. 2:10-cv-00106-LRH-VCF District of Nevada, Las Vegas ORDER

Before: GRABER and FRIEDLAND, Circuit Judges, and FOGEL,* District Judge.

Judges Graber and Friedland have voted to deny the petition for rehearing en banc for Appellant Rimini Street, Inc., and Judge Fogel has so recommended.

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* The Honorable Jeremy D. Fogel, United States District Judge for the Northern District of California, sitting by designation.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

The petition for rehearing en banc for Appellant Rimini Street, Inc., is DENIED.